SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 9693

SEELEY TUBE & BOX COMPANY, APPELLANT,

vs.

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY

APPENDIX TO BRIEF FOR APPELLANT AND PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Appendix to Brief for Appellant

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1 **Appendix**

Docket Entries

1945

Oct. 4. Complaint filed. Summons issued. Notice of Allocation filed (Newark).

Oct. 10. Summons returned—served on U. S. Atty. and Atty. General on 10/5/45. Served on John E. Manning, Collector, on 10/8/45 filed.

Nov. 27. Stipu-ation and Order extending time to answer to 3 Jan. 46 (Meaney) filed.

1946

Jan. 2. Stipulation and Order extending time to answer to 3 Feb. 46 (Meaney) filed.

Feb. 5. Stipulation and Order extending time to answer to 3 Mar. 46 filed (Meaney).

Mar. 11. Stipulation and Order extending time to answer to April 3, 46 filed (Mar. 8 '46 (Meaney).

Apr. 1. Stipulation and Order extending time to answer to May 3/46 filed (Meaney).

May 11. Answer filed.

1947

Feb. 18. Stipulation of Facts filed Feb. 17/47.

Feb. 20. Copy of notice of trial (Smith) on Mar. 18/47 filed.

Mar. 25. Trial without jury before Hon. Wm. F. Smith. Decision Reserved. Briefs to be filed.

2 *1948*

Mar. 4. Finding of Facts and Conclusions of Law and Judgment of no cause for action in favor of the defendant, John E. Manning as Collector of Internal Revenue and against the plaintiff, Seeley Tube & Box Co. with cost, filed, (Smith) Notice Mailed.

Apr. 1. Notice of Appeal filed Mar. 31/48. Bond on Appeal filed Mar. 31, 48. Copy of Notice of Appeal forwarded to Edgar H. Rossbach, Esq., U. S. Atty. and to Clark, U. S. C. C. A.

Apr. 2. Statement of Points, filed 4/1/48. Designation of Contents of Record of Appeal filed 4/1/48.

May 4. Record of Appeal forwarded to the U. S. C. C. A.

3 *Stipulation of Facts*

Now come the plaintiff and defendant by their respective counsel and agree that the following facts may be taken as true with the

right reserved to either party to introduce additional facts not inconsistent with those contained herein:

I

Seeley Tube & Box Company is a corporation organized under the laws of the State of New Jersey with its principal place of business at West Clinton Street, Dover, New Jersey.

On July 7, 1943, the said Seeley Tube and Box Company was adjudged a bankrupt by the United States District Court for the District of New Jersey.

On July 7, 1943, William A. Dolan was appointed receiver in bankruptcy by the aforesaid Court and on that date qualified as such receiver and continued to act in that capacity until his appointment on September 29, 1943, as trustee in bankruptcy for said company.

On January 3, 1945, Seeley Tube & Box Company filed a petition in the United States District Court for the District of New Jersey under the provisions of Chapter XI of the Bankruptcy Act. On said date William A. Dolan was continued by the Court as trustee in pos-session of the assets of said Seeley Tube and Box Company, a debtor, in proceedings under said Chapter XI of the Bankruptcy Act.

An amended plan of arrangement proposed by Seeley Tube & Box Company in the aforesaid proceedings was confirmed and approved by order of the Court on June 4, 1945. By the terms of the aforesaid order the Seeley Tube & Box Company was revested with title of all of its assets of whatever nature, character and description.

4 II

The taxes involved in this action were paid to the defendant John E. Manning who at all times material to this action was the United States Collector of Internal Revenue for the Fifth District of New Jersey.

III

On December 15, 1941, plaintiff filed its corporate income, declared value excess-profits and defense tax return for its fiscal period beginning January 1, 1941, and ending September 30, 1941, with the defendant. The return disclosed net income for declared value excess-profits tax computation of $84,396.96 and normal tax net income of $56,882.55, and total income, declared value excess-profits and defense taxes due of $17,383.59, which taxes it paid to the defendant as follows: On December 15, 1941, $4,345.92; on March 16, 1942, $4,345.89; on June 17, 1942, $4,345.89, and on September 17, 1942, $4,345.89.

On December 15, 1941, plaintiff filed its excess-profits tax return for the fiscal period beginning January 1, 1941, and ending September 30, 1941, with the defendant. The return disclosed that the excess profits net income for said period was annuallized, $121,893.32, and that excess profits tax was due thereon of $27,514.41, which plaintiff paid to the defendant as follows: On December 15, 1941, $6,878.61; on March 16, 1942, $6,878.60; on June 17, 1942, $6,878.60 and on September 17, 1942, $6,878.60.

The taxes shown on the aforesaid returns were assessed by the Commissioner on January 12, 1942. A copy of the assessment list showing the assessments is attached hereto, made a part hereof and marked Exhibit "1."

IV

On August 2, 1943, after audit of plaintiff's tax returns set forth in paragraph III above, the Commissioner of Internal Revenue assessed against the Seeley Tube & Box Company for its fiscal period beginning January 1, 1941, and ending September 30, 1941, in accordance with existing Internal Revenue law applicable to bankruptcies and receiverships the following deficiencies:

Corporate income, declared value excess-profits and defense taxes in the sum of $11,494.31, together with interest thereon of $1,125.97, a total of $12,620.28.

Excess profits tax in the sum of $36,294.99, together with interest thereon of $3,555.42, a total of $39,850.41.

A copy of the assessment list showing the aforesaid assessments is attached hereto, made a part hereof and marked Exhibit "2".

V

Subsequently, on March 21, 1944, the Commissioner assessed deficiencies against plaintiff for the same period as follows:

Corporate income, declared value excess-profits and defense taxes in the sum of $418.43, together with interest thereon of $56.90, a total of $475.33.

Excess profits tax of $606.43 together with interest thereon of $82.66, a total of $689.09.

Copies of the assessment lists showing the aforesaid assessments are attached hereto, made a part here and marked Exhibits "3" and "4", respectively.

VI

On March 3, 1944, pursuant to an extension of time granted William A. Dolan, trustee, Seeley Tube & Box Company
6 in bankruptcy filed with the defendant corporate income and declared value excess-profits tax return for its fiscal year beginning October 1, 1942, and ending September 30, 1943, disclosing loss for said year in the sum of $231,514.

VII

Subsequently, said return for plaintiff's fiscal year beginning October 1, 1942, and ending September 30, 1943, was audited and as a result of said audit the Commissioner of Internal Revenue determined that plaintiff's net operating loss for said period was not more than $218,612.51 to which the taxpayer agreed.

The taxpayer, by its trustee in bankruptcy, William A. Dolan, on August 14, 1944, executed an "Acceptance of Proposed Overassessment" for its taxable period ended September 30, 1941.

A copy of said Acceptance of Proposed Overassessment is attached hereto, made a part hereof and marked Exhibit "5".

VIII

On May 17, 1944, the Commissioner abated, for reasons not pertinent to this action, corporate income, declared value excess-profits and defense taxes which he had heretofore assessed against the plaintiff for its tax period beginning January 1, 1941, and ending September 30, 1941, in the sum of $418.43, together with interest thereon in the sum of $56.90, a total abatement of $475.33.

IX

On March 15, 1944, William A. Dolan, trustee, Seeley Tube & Box Company, in bankruptcy, filed with the defendant a claim for refund of income, declared value excess-profits and de-
7 fense taxes with respect to its fiscal period, January 1, 1941, through September 30, 1941, in the sum of $17,383.59. A true copy of said claim is attached hereto, made a part hereof and marked Exhibit "6".

On March 15, 1944, the aforesaid William A. Dolan, trustee, filed a claim for refund of excess-profits tax with respect to plaintiff's tax period, January 1, 1941, through September 30, 1941, in the sum of $27,514.41. A copy of said claim is attached hereto, made a part hereof and marked Exhibit "7".

X

On December 7, 1944, the aforesaid William A. Dolan, trustee, filed a claim for refund of income, declared value excess-profits

and defense taxes with respect to plaintiff's fiscal period beginning January 1, 1941, and ending September 30, 1941, in the sum of $30,003.87.

On December 7, 1944 the aforesaid William A. Dolan, trustee, filed a claim for refund of excess profits tax for plaintiff's fiscal period beginning January 1, 1941, and ending September 30, 1941, in the sum of $68,053.91.

XI

On February 9, 1945, the Commissioner of Internal Revenue, pursuant to Public Decision No. 8229, approved February 3, 1945, issued to William A. Dolan, trustee in bankruptcy, Seeley Tube & Box Company, certificates of overassessment Nos. 2824943 and 2824944.

Copies of Public Decision No. 8229 and certificates of overassessment Nos. 2824943 and 2824944, respectively, are attached hereto, made a part hereof and marked Exhibits "8", "9", and "10".

8

XII

Pursuant to the public decision and the certificates of overassessment set forth in paragraph XI above, there was refunded to the plaintiff $40,384.66, which amount represented the taxes it had paid for its fiscal period beginning January 1, 1941, and ending September 30, 1941, less interest assessed on the assessed tax deficiencies, namely, $4,513.34, and the balance of the unpaid assessments were abated.

Dated: This 17th day of February, 1947.

HERBERT ELLEND,
ALBERT FREEMAN,
Of Counsel, Attorneys for the Plaintiff.
EDGAR H. ROSSBACH,
United States Attorney.
EDWARD V. RYAN,
Assistant United States Attorney,
Attorneys for the Defendant

(Exhibits "1", "2", "3", "4", "5", "6", "7", "8", "9", and "10" herein referred to are omitted from this appendix.)

9

Findings of Fact and Conclusions of Law

SMITH, District Judge:

This is a civil action for the recovery of $4,513.34, representing interest on certain deficiency taxes for the fiscal period beginning January 1, 1941 and ending September 30, 1941, which the plain-

tiff alleges were erroneously assessed and collected. The action is submitted to the Court on a stipulation of facts which we adopt as our finding of fact. It is necessary to repeat herein only the ultimate facts essential to the determination of the only question presented, which the parties concede is one of novel impression.

Facts

I

The plaintiff filed with the defendant its corporate income tax return for the fiscal period beginning January 1, 1941 and ending September 30, 1941. The reported tax liability in the amount of $17,383.59 was paid within time in four equal quarterly installments. The plaintiff also filed with the defendant its excess profits tax return for the same period. The reported tax liability of $27,514.41 was likewise paid within time in four equal quarterly installments. These taxes were assessed by the Commissioner of Internal Revenue on January 12, 1942.

II

Pursuant to the applicable provisions of the Internal Revenue Code, and particularly Section 274(a) of Title 26 U. S. C. A., the Commissioner of Internal Revenue, having determined a deficiency in each of the said taxes, assessed the following deficiency taxes: corporate income tax[1] in the sum of $11,494.31, together with interest thereon of $1,125.97, and excess profits tax in the sum of $36,294.99, together with interest thereon of $3,555.42. These deficiency taxes were assessed on August 2, 1943. There were additional deficiency taxes assessed on March 21, 1944. The amounts thereof are stated in paragraph V of the stipulation of facts. The deficiency taxes were not paid.

III

The plaintiff filed with the defendant its corporate income tax return for the fiscal period beginning October 1, 1942 and ending September 30, 1943. This return disclosed a net operating loss of $231,514.00 for the said period.[2] The said return was audited, and as a result thereof the Commissioner of Internal Revenue determined that the plaintiff's net operating loss for the said period was not more than $218,612.51. The plaintiff accepted this deter-

[1] The corporate income tax includes, in addition to the normal tax, the declared value excess profits tax and the defense tax.

[2] It should be noted that, an extension having been granted the plaintiff, the return was not filed until March 3, 1944.

mination and executed an "Acceptance of Proposed Overassessment" for the fiscal period beginning January 1, 1941 and ending September 30, 1941.

IV

The plaintiff filed with the defendant a claim for a refund in the sum of $17,383.99, the full sum of the corporate income tax paid for the fiscal year beginning January 1, 1941 and ending September 30, 1941. The plaintiff also filed with the defendant a claim for a refund in the sum of $27,514.41, the full sum of the excess profits tax paid for the same period. These claims for refund, filed on March 15, 1944, were predicated upon the asserted right to "a net operating loss carry-back" under Section 122 of the Internal Revenue Code of 1940, 26 U. S. C. A. 122.

11 The plaintiff filed amended claims for refund in which he asserted, in addition to his claim for taxes paid, a right to the abatement of his tax liability, including the interest assessed on the deficiency taxes.

V

The Commissioner of Internal Revenue recognized the right of the plaintiff to "a net operating loss carry-back" and determined an overassessment of income and excess profits taxes for the period in question, January 1, 1941 to September 30, 1941. (Decision No. 8229, approved February 3, 1945.—Exhibit 8). The Commissioner of Internal Revenue thereupon issued to the plaintiff two certificates of overassessment, in one of which (No. 2824944) he certified an overassessment of corporate income tax in the sum of $28,877.90 for the said period, and in the other of which (No. 2824943) he certified an overassessment of excess profits tax in the sum of $64,415.83 for the said period. The Commissioner of Internal Revenue refused to abate the interest assessed on the deficiency taxes.

VI

There was refunded to the plaintiff $40,384.66. This sum represented the corporate income and excess profits taxes actually paid for the period in question, January 1, 1941 to September 30, 1941, less $4,513.34, the interest assessed on the deficiency taxes for the same period, which were not paid. The balance of the unpaid assessments, comprised entirely of the deficiency taxes, were abated. The sum of $4,513.34, representing the unpaid interest on the deficiency taxes, was withheld by the defendant and applied to the payment of the said interest.

12 *Statutes*

The pertinent provisions of the Internal Revenue Code are stated in the appendix hereto annexed.

Discussion

It is conceded that the taxpayer paid the income and excess profits taxes reported in the respective returns for the fiscal year 1941 within time. There was, however, an additional obligation upon the taxpayer, the obligation to pay the deficiency taxes, together with interest thereon "from the date prescribed for the payment of the first installment" to the date the deficiency was assessed. Section 292. The taxpayer failed to meet this obligation.

The taxpayer contends that the application of Section 122(b) extinguished not only the entire tax liability for the fiscal year 1941 but also the liability for interest on the deficiency taxes. We cannot agree with this contention.

Section 23 allows as deductions from gross income, in addition to the other items therein enumerated, "the net operating loss deduction computed under section 122." These sections, and particularly 23(s) and 122 (a) and (b), when read together, allow as a deduction "a net operating loss carry-back"; the net operating loss sustained by a taxpayer in "any taxable year after December 31, 1941" is deductible from the gross income of the taxpayer for the two preceding taxable years. The application of these sections may extinguish the tax liability for the preceding taxable years, as it has here, but the application of these sections will not extinguish the liability for interest assessed on deficiency taxes.

The interest assessed under Section 292, although "collected as a part of the tax," is not a tax. *United States* v. *Childs*, 266 U. S. 304, 309; *Owens* v. *Commissioner of Internal Revenue*, 125 F. 2d 210, 213; *Penrose* v. *United States*, 18 F. Sup. 413, 415.

13 This interest is clearly intended to compensate the Government for the delay in the payment of taxes imposed by statute and assessed thereunder. Ibid.

It must be conceded that interest collected as a part of a tax must be refunded together with the tax upon determination that the tax was illegally assessed. There is no contention in the instant case that the deficiency taxes and the interest thereon were illegally assessed; they were legally assessed and were due upon notice and demand. The extinguishment of the tax liability for the fiscal year 1941 resulted, not from a determination that the taxes as assessed were illegal but from the application of Section 122(b). The application of this section abolished the right of the defendant to collect the deficiency taxes but not his right to collect the interest as compensation for the plaintiff's delay in their payment.

Conclusions

I

The liability of the plaintiff for the interest assessed on the deficiency taxes for the fiscal year 1941 was not extinguished upon the application of Section 122(b) of the Internal Revenue Code. The defendant lawfully applied the sum of $4,513.34 to the payment of the interest on the deficiency taxes for the said year. Judgment in favor of the defendant and against the plaintiff must, therefore, be entered.

II

Pursuant to Rule 58 of the Rules of Civil Procedure a judgment in favor of the defendant and against the plaintiff will be entered forthwith by the Clerk of the Court.

APPENDIX

§ 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(s) *Net Operating Loss Deductions.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U. S. C. 1940 ed., § 13.)

* * * * * *

§ 122. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of Carry-back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(26 U. S. C. 1940 ed., § 122.)

* * * * * *

§ 292. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, * * *.

(26 U. S. C. 1940, ed., § 292.)

16 *Judgment*

United States District Court, District of New Jersey

Office of the Clerk, Newark 1, N. J.

March 4th, 1948

SEELEY TUBE & BOX CO.

vs.

JOHN E. MANNING, Coll.

Docket No. Civil #6597

Notice is hereby given of the entry on March 4th, 1948 of a judgment in the above proceeding.

WILLIAM H. TALLYN,
Clerk.

17 *Designation of Contents of the Record on Appeal*

The plaintiff hereby designates the contents of the record on appeal as follows:

1. Docket Entries.
2. Complaint.
3. Answer.
4. Stipulation of Facts.
5. Findings of Fact and Conclusions of Law filed by Honorable William F. Smith.
6. Notice of Entry of Judgment dated March 4, 1948.
6A. Notice of Appeal.
7. This designation of the record.
8. Statement of Points.

BILDER, BILDER & KAUFMAN,
Attorneys for the Plaintiff.

ALBERT FREEMAN,
Of Counsel.

18 United States Court of Appeals for the Third Circuit

No. 9693

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY, APPELLANT

v.

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY

On Appeal from the United States District Court for the District of New Jersey

Present: Biggs, Chief Judge and Goodrich and O'Connell, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with directions to order judgment for the plaintiff.

For the Court,

HERBERT F. GOODRICH,
Circuit Judge.

Dec. 20, 1948.

Endorsements: Judgment Reversing Judgment of District Court, etc. Received & Filed Dec. 20, 1948. Ida O. Creskoff, Clerk.

United States Court of Appeals for the Third Circuit

No. 9693

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY, APPELLANT

v.

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY

On Appeal from the Judgment of the United States District Court for the District of New Jersey

Argued November 18, 1948

Before Biggs, Chief Judge, and Goodrich and O'Connell, Circuit Judges

Opinion of the Court

Filed December 20, 1948

By Goodrich, Circuit Judge.

This is a suit by a taxpayer to get back some money from the Government. The taxpayer was entitled to a refund for taxes paid in 1941.[3] It was repaid $40,384.66 and the Government kept back $4513.34 which it claimed as interest upon an alleged deficiency. The District Court denied relief to the taxpayer who, therefore, seeks help here.

The point of the case can best be understood if non-technically stated, leaving statutory references and the like for foot-
20 note elaboration. The taxpayer paid the tax it thought due for income and excess profits for 1941. Later deficiencies on both income and excess profits taxes were asserted by the Commissioner. Because the taxpayer had gone into bankruptcy the assessments were perfected in the accelerated fashion provided for in the statute.[4] Then in 1943 the taxpayer had a severe operating

[3] The taxpayer's fiscal period involved here is from January 1, 1941 to September 30, 1941. It filed its tax returns and paid taxes covering this period, and it is these payments to which the carry-back provisions are applicable.

[4] Internal Revenue Code § 274 provides:

"Sec. 274. BANKRUPTCY AND RECEIVERSHIPS—(a) Immediate Assessment.

"Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any

loss. By the terms of the statute there is a carry-back provision for the operating loss and the taxpayer is entitled to credit therefor back through 1941.[5] As a result of the application of the statutory rule the alleged deficiency in the taxpayer's 1941 tax dis-
21 appeared. Not only that, but the taxpayer became entitled to a refund on the amount it had paid for the same year. It is the difference between what it paid and what the Government paid it back that is the subject-matter of this suit.

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taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy or the appointment of the receiver."

[5] The applicable provision of the Internal Revenue Code reads as follows:

"Sec. 122. NET OPERATING LOSS DEDUCTION.

* * * * * *

"(b) Amount of Carry-Back and Carry-Over—(1) Net Operating Loss Carry-Back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net

It is argued on behalf of the Commissioner that the money was due when the deficiency was asserted.[8] The Government is, on this argument, entitled to interest on the difference between what the taxpayer paid and what the Government claimed until the debt due the Government was swept away by the application of the carry-back provisions of the statute already mentioned. The taxpayer, on the other hand, says that it does not owe interest for non-payment of deficiencies in taxes which, in the light of subsequent events, have been found not to exist.

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income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6) and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss."

[8] The applicable sections of the Revenue Act of 1938, §§ 271, 292, 52 Stat. 534, 541 (1938) provide:

"Sec. 271. DEFINITION OF DEFICIENCY.

"As used in this chapter in respect of a tax imposed by this title 'deficiency' means—

"(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

"(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax."

"Sec. 292. INTEREST ON DEFICIENCIES.

"Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is the earlier."

We think the argument here is overwhelmingly on the side of the taxpayer. It should be noted at the outset that the taxpayer is not claiming any interest from the United States. If it were, a different sort of problem would be presented and some of the rather elaborate argument made on behalf of the Commissioner would be in point.[7] All the taxpayer wants is to get back the money it paid the Government which is undisputedly coming to it because of the carry-back provisions. It asks, in other words, for the return of principal only.

22

Interest not contracted for by the terms of an agreement between parties is generally described as damages for the detention of money to which another is entitled.[8] The Government adopts that theory in this case. But what money was the Government entitled to here? As it turned out, taxpayer not only did not owe any money, but had money coming back to it. The only thing on which an interest claim could be predicated is the inchoate liability of the taxpayer which disappeared under the application of the carry-back provisions of the statute. We think that inchoate liability is not sufficient to call for the payment of anything but inchoate interest, whatever that may be, and so far as real money is concerned the taxpayer is entitled to get it back.

Both sides admit there is little decided case law that is very helpful. The taxpayer certainly has analogous authority in its favor in one line of cases. These decisions allowed the recovery

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[7] "It was only by reason of the permitted retrospective deduction for the taxable period . . . of the so-called 'net operating loss carry-back' from the later year, as provided by Section 122 (b) (1), that the taxpayer eventually became entitled to an abatement of the deficiency taxes. This, however, was after they had already been in existence for some considerable time, as already shown. Hence, the only amount the Commissioner was legally permitted to refund was the aggregate sum of the taxes paid, less the statutory interest on the deficiencies which had accrued between the due date of the payment of the taxes on December 15, 1941, and the date of the deficiency assessments on August 2, 1943 (Section 292 (a)), no interest being refundable except that which accrued after the refund claims were filed on March 15, 1944 (Section 3771 (e)). Consequently, the Commissioner had no alternative than to refuse to refund the interest in question. The exaction of interest from the Government requires specific statutory authority . . . and it may be computed only according to the statutory provisions in force at the time of the allowance of a refund or credit . . ." Brief for Appellee, pp. 13-14.

[8] 15 Am. Jur., Damages § 159 (1938); Restatement, Contracts § 337 (1932).

by the taxpayer against the Government of interest paid on a tax by the taxpayer in a situation where it developed that
23 the assessment was erroneous. The taxpayer was allowed to recover the interest he had paid in spite of a compromise agreement made with the Government at the time he paid the interest. Big Diamond Mills Co. v. United States, 51 F. 2d 721 (C. C. A. 8, 1931); Colorado Milling & Elevator Co. v. Howbert, 57 F. 2d 769 (C. C. A. 10, 1932); Phelps v. United States, 105 F. 2d 904 (C. C. A. 2, 1939). It also cites a previous ruling by the Commissioner which tends to support this point of view.[9]

The Commissioner relied heavily on Brandtjen & Kluge, Inc. v. United States, 78 F. Supp. 509 (D. C. Minn. 1948). This case is not exactly in point because a plaintiff was trying to get back interest and the court did not think that a refund of a tax included interest. But it is pretty close to the case before us, and the court there relied upon the instant case in the District Court for authority. The Minnesota court also pointed out that the plaintiff's argument was "appealing, forceful and persuasive of the lack of logic in the Bureau's refusal to return the interest . . . " 78 F. Supp. 509, 513.

After reviewing the authorities and reading the legislative history cited to us by each side we conclude to reverse. And the basis for that reversal, simply stated, is that the interest on nothing (what taxpayer owed the Government) is necessarily nothing. Therefore, the taxpayer is entitled to his money.

The judgment will be reversed with directions to order judgment for the plaintiff.

A true Copy:
Teste:

_____,
Clerk of the United States Court of Appeals for the Third Circuit.

24 I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, and proceedings in this Court in the case of Seeley Tube & Box Company vs. John E. Manning, Collector of Internal Revenue for the Fifth District of New Jersey, No. 9693, on file, and now remaining among the records of the said Court, in my office.

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[9] Referring to penalties and interest collected without authority, this ruling states ". . . that interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax." I. T. 1447, I-2 C. B. 220 (1922).

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 20th day of April in the year of our Lord one thousand nine hundred and forty-nine, and of the Independence of the United States the one hundred and seventy-third.

IDA O. CRESKOFF,
[SEAL] *Clerk of the U. S. Court of Appeals, Third Circuit.*

25 Supreme Court of the United States, October Term, 1948

No. —

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

vs.

SEELEY TUBE & BOX COMPANY

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,
It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 18th, 1949.

HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of March, 1949.

26 In the Supreme Court of the United States, October Term, 1948

No. —

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

v.

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY

Stipulation

Subject to the approval of this Honorable Court, it is hereby stipulated and agreed by and between the attorneys for the parties in the above-entitled cause that, for the purpose of the

petition for a writ of certiorari, the printed record may consist of the following:

1. The appendix to the brief for the appellant in the United States Court of Appeals for the Third Circuit.

2. The proceedings before the United States Court of Appeals for the Third Circuit.

It is further stipulated and agreed that the petitioner will file the entire transcript of the record now on file in the office of the Clerk of the United States Court of Appeals for the Third Circuit with the Clerk of the United States Supreme Court, and that in the event the petition for a writ of certiorari is granted the printed record shall consist of the proceedings in the court below and such portions of the entire transcript of the record certified by the Clerk of the United States Court of Appeals for the Third
27 Circuit as the respective parties may designate. It is further agreed that either party may, in the petition and briefs, refer to any portions of the typewritten transcript of record which is not included in the printed record filed with this Court.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

April 19, 1949.

BILDER, BILDER & KAUFMAN,
Attorneys for Appellant.

April 20, 1949.

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Supreme Court of the United States

Order allowing certiorari

Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER

v.

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of John E. Manning, as Collector of Internal Revenue for the Fifth District of New Jersey, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 20, 1948, reversing the judgment of the United States District Court for the District of New Jersey.

OPINIONS BELOW

The opinion of the District Court (R. 5-10) is reported in 76 F. Supp. 937. The opinion of the Court of Appeals (R. 13-17) is reported in 172 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1948 (R. 12). By order of Mr. Justice Burton, dated March 5, 1949, the time within which a petition for a writ of certiorari might be filed was extended to and including May 18, 1949 (R. 18). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254.

QUESTION PRESENTED

Because the taxpayer had underpaid its corporate income and excess profits taxes for 1941, the Commissioner assessed deficiencies in the amount of the underpayments plus interest on the deficiencies from the 1941 date when they should have been paid to the date of assessment. Later, after the close of the tax year 1943, it was determined that the taxpayer had suffered a net operating loss during 1943 which resulted in the abatement of the 1941 deficiencies through allowance of the net operating loss carry-back deduction provided by Sections 23(s) and 122(a) and (b) of the Internal Revenue Code.

The question presented is whether the subsequent net operating loss also has the effect of denying to the Commissioner a right to the interest assessed for failure to pay the tax due and owing in 1941.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 15-20.

STATEMENT

The facts are not in dispute. The district court adopted as its findings of fact the stipulation of facts upon which the case had been submitted to it (R. 6). They may be summarized as follows:

In its corporate income tax return filed with the Collector for the fiscal period beginning January 1, 1941, and ending September 30, 1941, taxpayer reported an income tax liability of $17,383.59.[1] This, it timely paid in four equal quarterly installments. Taxpayer also filed with the Collector its excess profits tax return for the same period, reporting excess profits tax liability of $27,514.41, likewise paid in time in four equal quarterly installments. These returns were filed on December 15, 1941 (R. 2, 3, 6), and the taxes were assessed by the Commissioner of Internal Revenue on January 12, 1942 (R. 3, 6).

Deficiencies in both income and excess profits taxes were assessed by the Commissioner on August 2, 1943, as follows: corporate income tax in the sum of $11,494.31, together with interest of $1,125.97, and excess profits tax in the sum of $36,294.99, together with interest in the sum of

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[1] The corporate income tax included, in addition to the normal tax, the declared value excess profits tax and the defense tax (R. 6, fn. 1).

$3,555.42. Additional income and excess profits deficiency taxes were assessed on March 21, 1944, in the amounts of $418.43 and $606.43, together with interest in the sums of $56.90 and $82.66, respectively. (R. 3, 6.)[2] The deficiency taxes were not pay (R. 6).

Subsequently, the taxpayer filed with the Collector its corporate income tax return for the fiscal period October 1, 1942, to September 30, 1943.[3] This disclosed a net operating loss of $231,514 for that period, but after audit, the Commissioner determined that the net operating loss did not exceed $218,612. To this the taxpayer subsequently agreed. On March 15, 1944, the taxpayer filed with the Collector a claim for refund in the sum of $17,383.59, the full sum of the corporate income tax which it had paid for the fiscal year beginning January 1, 1941 and ending September 30, 1941; it also filed a claim for refund in the sum of $27,514.41, the full amount of the excess profits tax, which it had paid for the same period. These claims for refund were predicated upon the net operating loss carry-back provided by Section 122 of the Internal Revenue Code. Later, the taxpayer

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[2] Because the taxpayer had gone into bankruptcy on July 7, 1943, the assessments were perfected in the accelerated fashion provided for under Section 274 (a) of the Internal Revenue Code (R. 6). Thereafter, on January 3, 1945, taxpayer filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840). By an amended plan of arrangement, approved June 4, 1945, the taxpayer was revested with title to all its assets. (R. 2.)

[3] An extension having been granted, the return was not filed until March 3, 1944. (R. 6.)

filed amended claims for refund in which it asserted, in addition to its claim for taxes paid, a right to the abatement of its tax liability for the deficiencies which the Commissioner had determined, including interest assessed on those deficiencies. (R. 4-5, 6-7.)

The Commissioner recognized the right of taxpayer to the asserted net operating loss carry-back and determined an overassessment of income and excess profits taxes for the period in question, January 1, 1941 to September 30, 1941. The Commissioner thereupon issued to taxpayer two certificates of overassessment, in one of which (No. 2824944) he certified an overassessment of corporate income tax in the sum of $28,877.90, and in the other (No. 2824943), he certified an overassessment of excess profits tax in the sum of $64,415.83. However, the Commissioner refused to abate the interest assessed on the deficiency taxes. (R. 5, 7.)

There was refunded to taxpayer the total sum of $40,384.66, representing the corporate income and excess profits taxes actually paid for the period in question, less $4,513.34, the interest assessed on the deficiency taxes for the same period, which had not been paid. The balance of the unpaid deficiency assessments was abated. The $4,513.34 withheld was applied to the payment of interest on the deficiency assessments. (R. 5, 7.)

In this suit, brought against the Collector for the recovery of the interest in the amount of $4,513.34 (R. 5), the district court held that the application of the net loss carry-back provisions of the

statute did not extinguish the liability for interest imposed by Section 292 of the Internal Revenue Code from the date the 1941 taxes had originally become due until the date the deficiencies were assessed, and accordingly entered judgment of no cause of action in favor of the Collector (R. 8-9, 11).

On appeal by the taxpayer, the Court of Appeals reversed with directions to enter judgment for the taxpayer (R. 12).

REASONS FOR GRANTING THE WRIT

1. This case presents a question of large and continuing administrative importance in the functioning of the tax laws. The issue involved arises whenever a taxpayer fails to file a correct return within the time prescribed by law, fails to pay the tax based upon such correct return, and subsequently, in a later year, suffers a net operating loss by virtue of which he becomes entitled to a net operating loss carry-back deduction. Internal Revenue Code, Sections 23 (s) and 122 (a) and (b), Appendix, *infra*, pp. 15, 16-17. Cases involving the unused excess profits credit carry-back raise problems identical with those arising in connection with the net operating loss carry-back. See Appendix, *infra*, pp. 18-19. We have been informed by the Treasury Department that there are literally thousands of such cases pending before administrative officials representing in the aggregate an immense amount of revenue, that it will be impracticable to make the necessary adjustments and to

close numbers of these cases unless and until the question at issue is settled, and that many cases already closed may have to be reopened until a definite rule is obtained.

On the basis of a field survey made during March, 1949, the Treasury Department has reported that there were 11,259 previously adjusted cases involving this issue in 1947, and 14,962 such cases in 1948. It is estimated that from 1945 to 1948, inclusive, there were 42,721 cases involving this issue and that, in 1949, there will be 15,912 such cases. The amount of interest revenue involved in these cases is estimated to be $39,720,925. The Treasury concludes that "So long as the carry-back provisions of the Code are effective the issue presented in the Seeley case will be involved in a substantial number of cases, probably not less than 15,000 yearly."[4] Thus it is important from the viewpoint both of taxpayers and the Government that the question here involved be settled by the highest authority at the earliest possible date.

The lower courts have reached conflicting results. The district court in the instant case decided in favor of the Collector, and the court below in favor of taxpayer. In *Brandtjen & Kluge, Inc.* v. *United States,* 78 F. Supp. 509 (D. Minn.), the district court decided the issue in favor of the Government following the decision of the district court below.

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[4] Memorandum from C. W. Stowe, Acting Deputy Commissioner, dated April 1, 1949, to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, transmitted by Mr. Oliphant to Assistant Attorney General Caudle, on April 8, 1949.

The opinion below concedes that the instant case and *Brandtjen & Kluge, Inc.* v. *United States, supra,* are "pretty close" (R. 17), but notes a factual distinction, which, as pointed out, *infra,* seems insubstantial. Under the circumstances, delay in final determination of the question, incident to further litigation in the lower courts and in particular pending decision by other Courts of Appeals, will work against the public interest.

2. The decision of the court below puts a premium on a taxpayer's failure to meet his tax obligations when they become due. There is no dispute that a taxpayer whose circumstances are identical with those of the respondent, except that he makes prompt and timely payment, would be entitled, upon determination that a net operating loss carry-back was available to him, only to a refund of the taxes paid. He would get no interest on the monies which were paid to, and held by, the Treasury, until such determination. For Section 3771(e) of the Internal Revenue Code, Appendix, *infra,* p. 20, specifically provides that in the case of refunds or credits resulting from application of the carry-back—

> no interest shall be allowed or paid with respect to such part of the overpayment before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board [Tax Court], whichever is earlier.

Yet, under the decision below, the delaying taxpayer retains the use of the money which he should have, but did not pay over, and is, nevertheless, not charged with interest covering the period of his delay. In other words, the taxpayer who meets his lawful obligations gets neither the use of the money nor interest as compensation for his loss of that use, while the delinquent taxpayer retains the use of the money and is not required to compensate the Government for its corresponding loss.[5]

Interest is "but the compensation due for the use of money" or an allowance "for damages caused by delay in discharging a duty." *Billings* v. *United States*, 232 U. S. 261, 285. Since, in tax cases, its

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[5] Suppose, for example, that taxpayers A and B each have the same income, deductions, etc., for the taxable year 1941 and that the correct tax for each, computed without regard to any carry-back, is $1,000. Taxpayer A correctly reports and pays his $1,000 on March 15, 1942. Taxpayer B, due to certain errors, reports and pays only $400 of tax. Taxpayers A and B each sustain a net operating loss in 1943 which, when carried back to 1941, offsets their entire 1941 income. Taxpayer A files claim for refund on his entire $1,000 tax for 1941 on January 1, 1944. On the same date, taxpayer B files claim for refund of $400 tax for 1941. Both claims will be allowed, and interest on the overpayments will be allowed in each case from January 1, 1944. No deficiency will be assessed in the case of B, but unless interest is charged B on $600 from March 15, 1942, to January 1, 1944, B will be placed in a position more favorable than A. The taxpayer who incorrectly reported his income will be the one placed in the favored position. The Government had the right to receive $1,000 from both A and B on March 15, 1942, and the right to hold and use that money, interest-free, until at least January 1, 1944. Under the opinion of the court below, not only does the Government lose the use of B's $600 for that period, but B, who reported his tax incorrectly, has that $600 to use in his business or otherwise, while A, who reported his tax correctly, does not have the use of a similar amount of money.

allowance to the Government rests "on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures" (*Rodgers* v. *United States*, 332 U. S. 371, 374), and it is granted even in the absence of statutory provision therefor (*Billings* v. *United States, supra*), it is not to be denied unless Congress has specifically so provided. Here Congress has provided otherwise.

Section 56 of the Internal Revenue Code, Appendix, *infra*, pp. 15-16, as applied to this case, required the taxpayer to pay the amount found by the Commissioner to be due in his deficiency determinations in 1941.[6] No payment having then been made, Section 292(a), Appendix, *infra*, p. 18, required that "interest upon the amount determined as a deficiency * * * be paid * * * from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed".[7]

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[6] Since there is and was no dispute, here relevant, with respect to the correctness of the deficiency determination, the amount so determined plus the amount paid was the "total amount of tax imposed." This entire amount should have been paid, under Section 56, beginning on December 15, 1941.

[7] The interest here involved was that which accrued between the due date of the payment of the taxes on December 15, 1941, and the date of the deficiency assessments of August 2, 1943 and March 21, 1944. (See pp. 3-4, *supra*.) The circumstance that the assessments were perfected here in accelerated fashion, pursuant to special statutory provisions in the case of bankruptcy (Internal Revenue Code, Section 274(a)), is immaterial. The date of bankruptcy was July 7, 1943 (R. 2), and in any event, by a plan of arrangement under Chapter XI of the Bankruptcy Act (Act of June 22, 1938,

The abatement of the principal amount of the deficiency by reason of the net operating loss carry-back did not, *ab initio,* relieve the taxpayer of its liability therefor. It was not until approximately ten months after the tax here involved was due and payable that the net operating loss carry-back was first enacted by Section 153(a) of the Revenue Act of 1942 (Appendix, *infra,* pp. 11-12, which amended Section 122(b) of the Internal Revenue Code. The extinguishment of the tax liability for the fiscal year 1941 resulted, not from a determination that the tax as assessed was illegal, but from the application of this new statutory provision of the Code. The application of this section was to grant a new deduction which had the effect of abating the existing tax deficiency for 1941, but, until the abatement, the Government was entitled to the entire tax. Thus, contrary to the ruling of the court below, taxpayer's liability on December 15, 1941, was not "inchoate" (R. 16) but actual and existent.

That the Government had the right to hold and use the principal amount of the deficiency at least until after the close of the year in which the taxpayer suffered its net operating loss is made perfectly clear by Section 3771(e), already referred to, *supra,* p. 8, which immunizes the Government

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c. 575, 52 Stat. 840), taxpayer, on June 4, 1945, was revested with title to all its assets. Hence, the recent decision of this Court in *City of New York* v. *Saper,* 336 U. S. 328, denying interest on tax claims after bankruptcy, if at all applicable, would diminish the Government's interest claim only to a minor extent.

from any claim to interest for such use. Were the Government's use of such monies illegal, it would be liable for interest. That is the teaching of the decisions relied on by the court below (R. 17) in which the tax was erroneously or illegally collected in the first place. Here, however, there is no question that the deficiencies were correctly assessed and Section 3771(e) indicates plainly that the Government was entitled to the use which taxpayer denied it by failing to make payment.

The Congressional committee which created the net operating loss carry-back deduction [8] plainly contemplated that the possibility of a future carry-back did not relieve the taxpayer of its duty to pay the tax of the prior year when and as due. It said (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 122, 123 (1942-2 Cum. Bull. 504, 596, 597)): [9]

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[8] Section 153 of the Revenue Act of 1942 was originally proposed by the Senate Finance Committee, whose report contains the following (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 122 (1942-2 Cum. Bull. 504, 596):

> This section, for which there is no corresponding provision in the House bill, amends section 122 of the Code. For the first time a carry-back of the net operating loss is allowed. The net operating loss for any taxable year beginning on or after January 1, 1942, may be carried back to the 2 preceding taxable years (but not to any taxable year beginning before January 1, 1941), and may be included in computing the net operating loss deduction for each such preceding taxable year. The net operating loss for any taxable year which is not used as a carry-back may be carried forward, as under existing law, to the 2 succeeding taxable years.

[9] The full statement of the Committee, with reference to Section 3771 (e), is as follows:

> A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit (see sec. 204 of the bill) will not be able to determine the deduction on ac-

> He must therefore file his return and pay his tax without regard to such deduction, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back.

Thus, the taxpayer owed a tax which was actual and real, and, contrary to the holding of the court below, did not amount to "nothing" (R. 17). It follows that when the taxpayer failed to meet this obligation, it became liable for interest.

The decision of the District Court in *Brandtjen & Kluge, Inc.* v. *United States*, 78 F. Supp. 509 (D. Minn.), following the decision of the District Court below, directly supports the Collector's contention here. There the taxpayer had paid a deficiency with interest and the question was whether or not taxpayer was entitled to a refund of the interest when, due to allowance of a carry-back excess profits credit, the deficiency concededly was

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count of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess profits credit. He must therefore file his return and pay his tax without regard to such deduction, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back. Inasmuch as any overpayment resulting from the deduction of such carry-back does not occur, as a practical matter, until the net operating loss or the unused excess profits credit for the future taxable year is determined, and inasmuch as it is desirable to insure promptness in the filing of claims to inform the Commissioner that such deductions have been determined, this section provides that no interest will be allowed with respect to any such overpayment for any period before the claim therefor is filed, or a petition asserting such overpayment is filed with the Board of Tax Appeals, whichever is earlier.

refundable. Here, on the other hand, taxpayer had never paid the interest and the Government withheld it in refunding overpayments. (R. 5, 7.) This factual difference, though mentioned by the Court of Appeals (R. 17), as already noted (*supra*, p. 8), clearly seems immaterial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [As added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862]. *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U.S.C. 23.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U.S.C. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the

close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U.S.C. 56.)

SEC. 122 [As added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "not operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) [As amended by Sec. 153 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Amount of Carry-Back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

(26 U.S.C. 122.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U.S.C. 271.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2 (a) of the Act of December 17, 1943, c. 346, 57 Stat. 601]. *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed * * *.

(26 U.S.C. 292.)

SEC. 711 [As added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat 974]. EXCESS PROFITS NET INCOME.

(a) *Taxable years beginning after December 31, 1939.*—The excess profits net

income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a)(2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [As added by Sec. 210 (a) of the Revenue Act of 1942, *supra*]. *Net operating loss deduction adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; and

* * * * *

(26 U.S.C. 711.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of

any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

(e) [As added by Sec. 153 (d) of the Revenue Act of 1942, *supra*]. *Claims Based on Carry-Back of Loss Or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier.

(26 U.S.C. 3771.)

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No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1949

JOHN B. MADDEN, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

v.

ATLANTIC FURNISHING COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 70

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER

v.

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 5-10) is reported in 76 F. Supp. 937. The opinion of the Court of Appeals (R. 13-17) is reported in 172 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1948 (R. 12). By order of Mr. Justice Burton, dated March 5, 1949, the time

within which a petition for a writ of certiorari might be filed was extended to and including May 18, 1949 (R. 18). The petition for a writ of certiorari was filed on May 12, 1949, and granted on June 27, 1949 (R. 20). The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

QUESTION PRESENTED

Because the taxpayer had underpaid its corporate income and excess profits taxes for 1941, the Commissioner assessed deficiencies in the amount of the underpayments plus interest from the 1941 date when they should have been paid to the date of assessment. Later, after the close of the tax year 1943 it was determined that the taxpayer had suffered a net operating loss during 1943 which resulted in the abatement of the 1941 deficiencies through allowance of the net operating loss carryback deduction provided by Sections 23 (s) and 122 (a) and (b) of the Internal Revenue Code.

The question presented is whether the subsequent net operating loss also has the effect of denying to the Commissioner a right to the interest assessed for failure to pay the tax due and owing in 1941.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 31-49.

STATEMENT

The facts are not in dispute. The District Court adopted as its findings of fact the stipulation of

facts upon which the case had been submitted to it. (R. 6.) They may be summarized as follows:

In its corporate income tax return filed with the Collector for the fiscal period beginning January 1, 1941, and ending September 30, 1941, taxpayer reported an income tax liability of $17,383.59.[1] This, it timely paid in four equal quarterly installments. Taxpayer also filed with the Collector its excess profits tax return for the same period, reporting excess profits tax liability of $27,514.41, likewise paid in time in four equal quarterly installments. These returns were filed on December 15, 1941 (R. 2, 3, 6), and the taxes were assessed by the Commissioner of Internal Revenue on January 12, 1942 (R. 3, 6).

Deficiencies in both income and excess profits taxes were assessed by the Commissioner on August 2, 1943, as follows: corporate income tax in the sum of $11,494.31, together with interest of $1,125.97, and excess profits tax in the sum of $36,294.99, together with interest in the sum of $3,555.42. Additional income and excess profits deficiency taxes were assessed on March 21, 1944, in the amounts of $418.43 and $606.43, together with interest in the sums of $56.90 and $82.66, respectively. (R. 3, 6.)[2]

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[1] The corporate income tax included, in addition to the normal tax, the declared value excess profits tax and the defense tax. (R. 6, fn. 1.)

[2] Because the taxpayer had gone into bankruptcy on July 7, 1943, the assessments were perfected in the accelerated fashion provided for under Section 274 (a) of the Internal Revenue Code (R. 6). Thereafter, on January 3, 1945, taxpayer filed

The deficiency taxes were not paid (R. 6).

Subsequently, the taxpayer filed with the Collector its corporate income tax return for the fiscal period October 1, 1942, to September 30, 1943.[3] This disclosed a net operating loss of $231,514 for that period, but, after audit, the Commissioner determined that the net operating loss did not exceed $218,612.51. To this the taxpayer subsequently agreed. On March 15, 1944, the taxpayer filed with the Collector a claim for refund in the sum of $17,383.59, the full sum of the corporate income tax which it had paid for the fiscal year beginning January 1, 1941, and ending September 30, 1941; it also filed a claim for refund in the sum of $27,514.41, the full amount of the excess profits tax, which it had paid for the same period. These claims for refund were predicated upon the net operating loss carry-back provided by Section 122 of the Internal Revenue Code. Later, the taxpayer filed amended claims for refund in which it asserted, in addition to its claim for taxes paid, a right to the abatement of its tax liability for the deficiencies which the Commissioner had determined, including interest assessed on those deficiencies. (R. 4-5, 6-7.)

The Commissioner recognized the right of taxpayer to the asserted net operating loss carry-back

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a petition for an arrangement under Chapter XI of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as added by the Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840. By an amended plan of arrangement, approved June 4, 1945, the taxpayer was revested with title to all its assets. (R. 2.)

[3] An extension having been granted, the return was not filed until March 3, 1944 (R. 6).

and determined an overassessment of income and excess profits taxes for the period in question, January 1, 1941, to September 30, 1941. The Commissioner thereupon issued to taxpayer two certificates of overassessment, in one of which (No. 2824944) he certified an overassessment of corporate income tax in the sum of $28,877.90, and in the other (No. 2824943), he certified an overassessment of excess profits tax in the sum of $64,415.83. However, the Commissioner refused to abate the interest assessed on the deficiency taxes. (R. 5, 7.)

There was refunded to taxpayer the total sum of $40,384.66, representing the corporate income and excess profits taxes actually paid for the period in question, less $4,513.34, the interest assessed on the deficiency taxes for the same period, which had not been paid. The balance of the unpaid deficiency assessments was abated. The $4,513.34 withheld was applied to the payment of interest on the deficiency assessments. (R. 5, 7.)

In this suit, brought against the Collector for the recovery of the interest in the amount of $4,513.34 alleged to have been erroneously assessed and collected (R. 5-6), the District Court held that the application of the net loss carry-back provisions of the statute did not extinguish the liability for interest from the date the 1941 taxes had originally become due until the date the deficiencies were assessed, and accordingly entered judgment of no cause of action in favor of the Collector (R. 8-9, 11).

On appeal by the taxpayer, the Court of Appeals reversed with directions to enter judgment for the taxpayer (R. 12).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Collector was not entitled to withhold from refund to taxpayer the interest in the sum of $4,513.34 upon the amounts of the deficiencies determined by the Commissioner for the fiscal period commencing January 1, 1941, and ending September 30, 1941.

2. In failing to hold that the Collector was entitled to retain such interest.

3. In failing to hold that a net operating loss sustained in 1943, carried back to 1941, did not entitle taxpayer to a refund of interest assessed for failure to pay as and when due income and excess profits taxes prescribed by law to be returned and paid in 1941.

4. In reversing the judgment of the District Court and directing judgment for taxpayer.

5. In failing to affirm the judgment of the District Court.

SUMMARY OF ARGUMENT

The decision below places a premium on a taxpayer's failure to meet his tax obligations when they become due. A taxpayer whose circumstances are identical with those of the respondent, except

that he makes prompt and timely return and payment, would be entitled, upon determination that a net operating loss carry-back was available to him, only to a refund of the taxes paid. He would get no interest on the monies which were paid to, and held by, the Treasury until such determination. Yet, under the decision below, the delaying taxpayer retains the use of the money which he should have, but did not pay over, and is, nevertheless, not charged with interest covering the period of his delay.

Since, in tax cases, interest allowance to the Government rests on its necessity to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures, and is granted even in the absence of statutory provision, it is not to be denied unless Congress has specifically so provided. Here Congress has provided otherwise. Section 56 of the Code fixed December 15, 1941, as the time of payment. The correctness of the deficiency determinations thereafter assessed by the Commissioner is not in issue. Section 292 (a) of the Code requires that interest upon the amount determined as a deficiency be paid from the date prescribed for the payment of the tax to the date the deficiency was assessed.

The abatement of the principal amount of the deficiency by reason of the net operating loss carryback did not, *ab initio*, relieve taxpayer of its liability therefor; until the abatement, the Government was entitled to the entire tax. Contrary to

the ruling of the court below, taxpayer's liability on December 15, 1941, was not inchoate but actual and existent. That the Government had the right to hold and use the principal amount of the deficiency at least until after the close of the year in which taxpayer suffered its net operating loss, is made clear by Section 3771 (e). This section immunizes the Government from any claim to interest for such use during the period it holds taxes, later refundable through operation of a carry-back. This is striking evidence of the legality rather than the wrongfulness of the Government's use.

The legislative history of Section 153 of the Revenue Act of 1942, which enacted the carry-back deduction, establishes that Congress plainly intended that a taxpayer was not relieved of his duty to pay the tax of the prior year when and as due without regard to the possibility of a carry-back arising in a future year, and that the taxpayer's obligation to pay the earlier year's tax was actual and real. The action of Congress since 1942 further confirms this construction. The addition of Section 3779 to the Code in 1945, furnishing an elaborate procedure whereby a corporation expecting a carry-back might obtain extension of time for payment of taxes of an earlier year, subject, however, to collection of interest during the extended period, clearly establishes that Congress contemplated that the tax for the earlier year was due and payable even though later abated by a carry-back, and that, contrary to the holding of the court below, the

carry-back did not *ab initio*, relieve taxpayer of liability therefor; otherwise no provision for an extension nor any compensation for use of the money during the extended period would have been requisite or proper.

Moreover, the result reached below implies an incredible willingness on the part of Congress to endanger the prompt collection of the revenue and tends, besides, to encourage speculation with respect to the occurrence of future losses on the part of the irresponsible and unscrupulous at the expense of the Government and the general body of law abiding citizens.

Again, since the carry-back is a matter of legislative grace, it is to be strictly construed and not extended beyond clear provision.

Finally, overpayment must appear before a refund is authorized. Although the present action is technically deemed an action at law, it is in the nature of an action for money had and received; it is equitable in function, controlled by equitable principles, and designed to avoid unjust enrichment. Here taxpayer defaulted in the statutory obligation to pay its taxes when due in 1941, and the Government's retention of the compensation for the delay in payment does not constitute unjust enrichment. The taxpayer is unable to show that the Collector has money which belongs to it.

ARGUMENT

A Net Operating Loss Sustained in 1943 and Carried Back to 1941, Does Not Entitle Taxpayer to a Refund of Interest Assessed for Failure to Pay, as and When Due, Income and Excess Profits Taxes Prescribed by Law to Be Returned and Paid in 1941

The issue in this case arises whenever a taxpayer fails to file a correct return within the time prescribed by law, fails to pay the tax based upon such correct return, and subsequently, in a later year, suffers a net operating loss by virtue of which he becomes entitled to a net operating loss carry-back deduction. Internal Revenue Code, Sections 23 (s) and 122 (a) and (b), Appendix, *infra*, pp. 31, 32-33. There is no dispute that a taxpayer whose circumstances are identical with those of the respondent, except that he makes prompt and timely return and payment, would be entitled, upon determination that a net operating loss carry-back was available to him, only to a refund of the taxes paid. He would get no interest on the monies which were paid to, and held by, the Treasury, until such determination. For Section 3771 (e) of the Internal Revenue Code, Appendix, *infra*, p. 39, specifically provides that in the case of refunds or credits resulting from application of the carry-back—

> no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or

> the filing of a petition with the Board [Tax Court], whichever is earlier.

Yet, under the decision below, the delaying taxpayer retains the use of the money which he should have, but did not pay over, and is, nevertheless, not charged with interest covering the period of his delay.[4] In other words, the majority of taxpayers who meet their lawful obligations get neither the use of the money nor interest as compensation for their loss of that use, while the delinquent taxpayer retains the use of the money and is not required to compensate the Government for its corresponding loss.[5] Thus, the effect of the decision

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[4] On the basis of a field survey made during March, 1949, the Treasury Department has reported that there were 11,259 previously adjusted cases involving this issue in 1947, and 14,962 such cases in 1948. It is estimated that from 1945 to 1948, inclusive, there were 42,721 cases involving this issue and that, in 1949, there will be 15,912 such cases. The amount of interest revenue involved in these cases through 1949 is estimated to be $39,720,925. See Government's petition for a writ of certiorari, pp. 6-7. Cases involving unused excess profits carry-back raise problems identical with those arising from the net operating loss carry-back. See Internal Revenue Code, Section 710 (c) (3), Appendix, *infra*, pp. 35-37.

[5] Suppose, for example, that taxpayers A and B each have the same income, deductions, etc., for the taxable year 1941 and that the correct tax for each, computed without regard to any carry-back, is $1,000. Taxpayer A correctly reports and pays his $1,000 on March 15, 1942. Taxpayer B, due to certain errors, reports and pays only $400 of tax. Taxpayers A and B each sustain a net operating loss in 1943 which, when carried back to 1941, offsets their entire 1941 income. Taxpayer A files claim for refund on his entire $1,000 tax for 1941 on January 1, 1944. On the same date, taxpayer B files claim for refund of $400 tax for 1941. Both claims will be allowed, and interest on the overpayments will be allowed in each case from January 1, 1944. No deficiency will be assessed in the case of B, but unless interest is charged B on

below is to put a premium on a taxpayer's failure to meet his tax obligations when they become due.

Congress intended no such discrimination. Interest is "but the compensation due for the use of money" or an allowance "for damages caused by delay in discharging a duty" (*Billings* v. *United States*, 232 U. S. 261, 285), and is granted even in absence of statutory provisions therefor. Recently, in *Rodgers* v. *United States*, 332 U. S. 371, 374, this Court, reaffirming "its holding" in the *Billings* case, *supra*, stated—

> that the Government does suffer recoverable damages if a taxpayer fails to pay taxes when due and is therefore equitably entitled to interest.

Accordingly, since, in tax cases, interest allowance to the Government rests "on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures" (*Rodgers* v. *United States, supra*, p. 374), and it is granted even in the absence of statutory provision therefor

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$600 from March 15, 1942, to January 1, 1944, B will be placed in a position more favorable than A. The taxpayer who incorrectly reported his income will be the one placed in the favored position. The Government had the right to receive $1,000 from both A and B on March 15, 1942, and the right to hold and use that money, interest-free, until at least January 1, 1944. Under the opinion of the court below, not only does the Government lose the use of B's $600 for that period, but B, who reported his tax incorrectly, has that $600 to use in his business or otherwise, while A, who reported his tax correctly, does not have the use of a similar amount of money.

(*Billings* v. *United States, supra*), it is not to be denied unless Congress has specifically so provided. Here Congress has provided otherwise.

A. *The respondent's liability for tax was actual and existent on December 15, 1941.*—Taxpayer's fiscal period began on January 1, 1941, and ended on September 30, 1941 (R. 2-3); hence, pursuant to Section 53 (a) (1) of the Internal Revenue Code (Appendix, *infra*, p. 31), its returns were required to be made on or before December 15, 1941.[6] Section 56 of the Code (Appendix, *infra*, pp. 31-32), as applied to this case, fixed the time of payment and required that "the *total* amount of tax imposed by this chapter" (italics supplied) should be paid on the same date, i.e., December 15, 1941.[7] There is and was no dispute, here relevant, with respect to the correctness of the deficiency determinations assessed by the Commissioner principally on August 2, 1943, and subsequently, in minor amounts, on March 21, 1944 (R. 3).[8] Accordingly, the amount so determined by the Commissioner plus the amount paid by taxpayer was the "total amount of tax

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[6] The excess profits tax was governed, so far as here relevant, by provisions applicable to the income tax. Internal Revenue Code, Sections 728 and 729. (26 U.S.C. 1946 ed., Secs. 728, 729).

[7] The option provided in Section 56 (b) (Appendix, *infra*, p. 32), for installment payments does not affect the discussion and will be disregarded.

[8] For reasons not pertinent to this action, on May 17, 1944, the Commissioner abated part of the deficiencies assessed on March 21, 1944 (R. 4). Consequently, out of the total interest in the amount of $4,513.34 here involved, only $82.66 is attributable to the March 1944, deficiency.

imposed" (Section 56 (a)). This amount, under Section 56 as applied to this case, was due and owing by taxpayer and should have been paid on December 15, 1941. Full payment, not having then been made, Section 292 (a), (Appendix, *infra*, p. 34), required that—

> interest upon the amount determined as a deficiency * * * be paid * * * from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed.

Hence, the interest here involved was that which accrued between the due date of the payment of the tax on December 15, 1941, and the date of the deficiency assessments of August 2, 1943, and March 21, 1944 (R. 2-4).[9]

B. *The carry-back provisions of the Internal Revenue Code were not intended to excuse a failure to make timely payment of taxes.*—The abatement of the principal amount of the deficiency by reason of the net operating loss carry-back did not, *ab initio*, relieve the taxpayer of its liability therefor. It was not until approximately ten months after

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[9] The recent decision of this Court in *City of New York* v. *Saper*, 336 U.S. 328, denying interest on tax claims after bankruptcy, if at all applicable, would diminish the Government's interest claim only to a minor extent, inasmuch as the date of bankruptcy was July 7, 1943 (R. 2). In any event, by a plan of arrangement under Chapter XI of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as added by the Act of June 22, 1938, c. 575, 52 Stat. 840, taxpayer, on June 4, 1945, was revested with title to all its assets. See fn. 2, *supra*, pp. 3-4.

the tax here involved was due and payable that the net operating loss carry-back was first enacted by Section 153 (a) of the Revenue Act of 1942, which amended Section 122 (b) of the Internal Revenue Code (Appendix, *infra*, pp. 32-33). The extinguishment of the tax liability for the fiscal year 1941 resulted, not from a determination that the tax as assessed was illegal, but from the application of this new statutory provision of the Code. The application of this section was to grant a new deduction which had the effect of abating the existing tax deficiency for 1941, but, until the abatement, the Government was entitled to the entire tax. Thus, contrary to the ruling of the court below, taxpayer's liability on December 15, 1941, was not "inchoate" (R. 16) but actual and existent.

That the Government had the right to hold and use the principal amount of the deficiency at least until after the close of the year in which taxpayer suffered its net operating loss is made perfectly clear by Section 3771 (e), already referred to, *supra*, pp. 10-11, which immunizes the Government from any claim to interest for such use. Were the Government's use of such monies illegal, it would be liable for interest. That is the teaching of the decisions relied on by the court below (R. 17), in which the tax was erroneously or illegally collected in the first place. Here, however, there is no question that the deficiencies were correctly assessed and Section 3771 (e) indicates plainly that

the Government was entitled to the use which taxpayer denied it by failing to make payment.

The Congressional committee which created the net operating loss carry-back deduction plainly contemplated that the possibility of a future carry-back would not relieve the taxpayer of its duty to pay the tax of the prior year when and as due. The carry-back deduction which was enacted, as above stated, by Section 153 of the Revenue Act of 1942, was originally proposed by the Senate Finance Committee whose report points out that (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 122-123 (1942-2 Cum. Bull. 504, 596-597)):

> This section, for which there is no corresponding provision in the House bill, amends section 122 of the Code. For the first time a carry-back of the net operating loss is allowed. * * *
>
> * * * * * * *
>
> A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit (see sec. 204 of the bill) will not be able to determine the deduction on account of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess profits credit.

The taxpayer owed a tax which was actual and real, and, contrary to the holding of the court below, did not amount to "nothing" (R. 17), for, as the Fi-

nance Committee went on to say (S. Rep. No. 1631, *supra*, p. 123 (1942-2 Cum. Bull. 504, 597)):

> He must therefore file his return and *pay his tax without regard to such deduction*, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back. (Italics supplied.)

It follows that where, as here, the taxpayer failed to meet this obligation and failed to pay the tax when due, it became liable for interest.

This conclusion finds added confirmation in the next succeeding sentence of this Committee Report, when, in recommending the provision, which subsequently became Section 3771 (e) of the Code already referred to, *supra*, pp. 10-11, the Senate Committee explained that (S. Rep. No. 1631, *supra*, pp. 123-124 (1942-2 Cum. Bull. 504, 597)):

> Inasmuch as any overpayment resulting from the deduction of such carry-back does not occur, as a practical matter, until the net operating loss or the unused excess profits credit for the future taxable year is determined, and inasmuch as it is desirable to insure promptness in the filing of claims to inform the Commissioner that such deductions have been determined, this section provides that no interest will be allowed with respect to any such overpayment for any period before the claim therefor is filed, or a petition asserting such overpayment is filed with the Board of Tax Appeals, whichever is earlier.

Since the overpayment does not occur until the future year when the net operating loss is determined, the Government was here entitled to the use of the tax money from the date the tax was due in December 1941, to the date when the overpayment occurred upon determination of the loss in the future taxable year, and, on the other hand, was under no liability to pay interest for such use. See p. 11, *supra*.

The decision of the District Court in *Brandtjen & Kluge, Inc.* v. *United States*, 78 F. Supp. 509 (D. Minn.), following the decision of the District Court below, directly supports the Collector's contention here. There the taxpayer had paid a deficiency with interest and the question was whether or not taxpayer was entitled to a refund of the interest when, due to allowance of a carry-back excess profits credit, the deficiency concededly was refundable. Here, on the other hand, taxpayer had never paid the interest and the Government withheld it in refunding overpayments (R. 5, 7). This factual difference, though mentioned by the Court of Appeals (R. 17), seems immaterial. Thus, the denial by the District Court of the interest refund in the *Brandtjen & Kluge* case squarely supports the contentions of the Government here.

C. *The Congressional understanding is in accord with the Collector's view, not that of the court below.*—The action of Congress since 1942 further

confirms the construction for which the Collector here contends. In recommending the Tax Adjustment Bill of 1945, the Ways and Means Committee described the defect and proposed remedy as follows (H. Rep. No. 849, 79th Cong., 1st Sess., pp. 5-6 (1945 Cum. Bull. 566, 569)):

> *Speeding up refunds from carry-backs*
>
> Under existing law, refunds resulting from the carry-back of net operating losses and unused excess-profits credits cannot be made until a considerable length of time after the loss or unused credit arises. The claim cannot be filed until after the year in which the loss or unused credit arises; for example, a claim arising from a loss in 1945 cannot be made until after the close of the year, when the amount of the loss has been determined. Moreover, following the filing of the claim, many months are usually required for auditing the returns for all years affected and for reviewing the claim before a refund can be finally made.
>
> To speed up the operation of the carry-back refund procedure, so that taxpayers may have the benefits of a currently improved cash position for reconversion, the bill provides (1) deferment of current tax payments on the basis of anticipated losses and unused credits; and (2) prompt payment of refunds after the loss or unused credit has occurred.

The first of these purposes was carried out by adding Section 3779 and the second by adding Section

3780 to the Internal Revenue Code (Appendix, *infra*, pp. 39-49), by the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, Section 4 (a). Section 3779 permits a corporate taxpayer anticipating a loss or unused credit for the current year, upon submission of an appropriate statement, to elect to defer payments of the preceding year's taxes, the amount deferred not exceeding the anticipated refund that would result from the carry-back of the loss or unused credit. This extension privilege is made operative with respect to taxes otherwise due in any taxable year ending on or after September 30, 1945. The second part of the plan to aid the cash position of a taxpayer is incorporated in Section 3780, and permits a quick refund technique known as a "tentative carry-back adjustment". Section 3780 goes into effect after the close of a taxable year in which a taxpayer finds that he has sustained a net operating loss or had an unused excess profits credit. He may then file an application for credit or refund of overpayments of prior years' taxes, which will result from carry-back of such loss or unused credit. The Commissioner is required to act upon such an application for a quick refund within ninety days (Section 3780 (b), Appendix, *infra*, p. 48), subject to later review (Section 3780 (c), Appendix, *infra*, p. 49).[10]

[10] The relief by way of quick refund afforded by Section 3780 is applicable both to individuals and corporations, but the extension of time for payment of taxes provided by Section 3779 is only afforded to corporations expecting carry-backs.

Section 3779 (i), quoted for convenience in the footnote,[11] bears most directly on the problem of interest involved in this case. The purpose and operation of this provision was explained in detail in the House Committee Report [12] (H. Rep. No.

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[11] SEC. 3779 [As added by Sec. 4 (a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517]. EXTENSIONS OF TIME FOR PAYMENT OF TAXES BY CORPORATIONS EXPECTING CARRY-BACKS.

* * * * * *

(i) *Interest.*—In the case of an amount the time for payment of which has been extended, there shall be collected as part of such amount interest from the dates on which payments would have been required if there had been no extension and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b)—

(1) upon so much of such amount as is satisfied under section 3780 (b) by applying or crediting thereto, within the period of extension, a decrease in tax determined in connection with an application under section 3780 (a), interest at the rate of 3 per centum per annum to the date of such satisfaction, except that on so much of such satisfied amount as is not in excess of the amount of the deficiencies assessed under section 3780 (b) and which is not so satisfied, the rate shall be 6 per centum per annum; and

(2) upon the remainder of the amount the time for payment of which has been extended, interest at the rate of 6 per centum per annum to the date such amount is paid.

If the Commissioner determines that during the period of extension credit or refund of an overpayment has been allowed or made, or a deficiency assessed, affecting the amount to which the extension relates and that the taxpayer could not have taken such overpayment or deficiency into account in the statement or a revised statement, appropriate adjustment shall be made in the interest.

[12] The Senate Committee concurred with the House Committee in recommending the bill and its report referred to the quoted report of the House Committee for detailed discussion of the provisions here pertinent. S. Rep. No. 458, 79th Cong., 1st Sess., p. 3 (1945 Cum. Bull. 592, 594).

849, *supra*, pp. 18-20 (1945 Cum. Bull. 578-579)), which, as far as here pertinent, reads as follows (pp. 19-20):

> It is to be particularly noted that interest on amounts the time for payment of which is extended under section 3779 will be payable at the rate of 3 percent per annum only if such amounts are satisfied by applying or crediting thereto, within the period of extension, a decrease in tax determined in respect of an application for a tentative carry-back adjustment. To the extent that such amounts are not so satisfied, interest is payable at the rate of 6 percent per annum. Thus if an extension is terminated either by action of the taxpayer or the Commissioner, interest is payable on the amount to which such termination relates at the rate of 6 percent per annum to the date of payment. Likewise, if the taxpayer pays some portion of the tax, the time for payment of which has been extended, prior to the termination of the extension, or if the taxpayer fails to file an application for a tentative carry-back adjustment prior to the last day of the month in which falls the date prescribed by law (including any extension of time granted the taxpayer) for filing the return for the year of the expected loss or unused credit, interest is payable at the rate of 6 percent per annum to the date of payment. If part of an amount the time for payment of which has been extended is satisfied by applying or crediting thereto a decrease determined in respect of an application for a tentative carry-back adjustment and

part is not so satisfied, interest is to be payable on the first part at the rate of 3 percent and on the second part at the rate of 6 percent per annum.

An illustration of the general operation of Sec. 3779, afforded by the House Committee in its report is quoted in the footnote.[13]

The Congressional committees which approved Sections 3779 and 3780 state that these proposals,

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[13] H. Rep. No. 849, *supra*, p. 13 (1945 Cum. Bull. 566, 574): Corporation A, which keeps its books and makes its tax returns on the calendar year basis, files its income and excess profits tax returns for 1945 on March 15, 1946. Such returns show that Corporation A owes $10,000 income tax and $15,000 excess profits tax for 1945. Corporation A, however, expects that its operations for 1946 will result in an unused excess profits credit of $20,000 for that year. The corporation further determines that such unused excess profits credit, if it in fact arises, when carried back to 1944 will result in a decrease of $9,100 in the aggregate of its taxes for 1944 and will not affect the amount of tax for any other year. Corporation A, therefore, may extend the time for payment of $9,100 of the taxes which it owes for 1945 and which would otherwise have to be paid on March 15 and on subsequent installment dates in 1946. Such extension in general will run until March 31, 1947, or, if Corporation A files an application for a tentative carry-back adjustment, pursuant to the provisions of section 3780, with respect to the unused excess profits credit of 1946, until the date on which notice is mailed by registered mail by the Commissioner to the taxpayer that such application is allowed or disallowed. Provisions are made for the payment of interest on the tax the time for payment of which was extended. *In general, such interest will be at the rate of 3 percent per annum upon an amount extended equal to the net reduction in Corporation A's taxes for 1944 and 1945 attributable to any carry-backs from 1946, as determined under an application filed under section 3780 (a) for a tentative carry-back adjustment, and at the rate of 6 percent per annum upon the remainder of the amount the time for payment of which was extended.* [Italics supplied.]

inter alia, derived from recommendations made by the Joint Committee on Internal Revenue Taxation For Post-War Taxation (H. Rep. No. 849, *supra,* p. 1; S. Rep. No. 458, *supra,* p. 1 (1945 Cum. Bull. 566, 592). Report No. 1 (1945) of this Joint Committee, treating particularly with interest on tax payments which were to be deferred under its proposal eventually enacted as Section 3779, explains (p. 8):

> 5. *Interest on deferred tax payments.*
>
> Under the proposed plan, all deferments of tax would bear interest. If the deferment exceeded the ultimate refund, the usual rate of 6 percent per annum would apply to the excess. Deferments not in excess of the ultimate refund would bear interest at half the usual rate on past due taxes (3 percent). This interest charge would discourage taxpayers from using the deferment privilege unless there were real need for cash. In the absence of such an interest charge, a strong incentive would exist for corporate officers to claim deferment whether or not the funds were needed. The difficulties connected with the operation of the plan are such that firms with easy access to alternative sources of funds should not be encouraged to make use of tax deferment. Moreover, the policy of charging interest would be in harmony with the existing policy that refunds due to carry-backs do not bear interest prior to the filing of a valid claim for refund. On the other hand, the suggested interest charge on

proper deferments is not high enough to discourage taxpayers in real need of funds.

Thus, Section 3779 (i) and the Committee Reports recommending it, clearly manifest that Congress understood the state of the law to be, during the years involved in this case, that interest was payable on taxes due for a prior year even though subsequently abated by operation of a net loss carry-back arising in a later year. It is noteworthy that the Internal Revenue Code makes careful provision for interest at 6 percent in cases where extensions in tax payments in general are granted. Sections 295 and 296 (26 U.S.C. 1946 ed., Secs. 295, 296). Section 3779(i) represents the exercise of special legislative grace, whereby the interest is reduced to 3 percent during the extended period provided that it turns out the tax for the earlier year is abated through operation of a loss carry-back in the succeeding year determined in connection with an application under Section 3780 (a). However, save for this limited exception, the customary 6 percent interest is to be collected on the unpaid tax for the preceding year from the date due until the date it is paid. The exception, as has been seen, was to apply only in tax years ending on or after September 30, 1945. Had Congress, in 1945, not understood, in consonance with the Collector's contention here, that interest was owing and collectible under the state of the law here applicable on the earlier year's unpaid tax, despite the subse-

quent year's carry-back, there would have been no need for the relief provided by Section 3779 (i) for the future. Moreover, under the limited alleviation thus granted, interest is never excused, merely diminished in the special instance where an extension has been granted under Section 3779 and a quick refund allowed under Section 3780.[14] In all other cases, even under the Tax Adjustment Act of 1945, *supra*, it continues collectible in the full 6 percent.[15]

Indeed, if the decision below is correct, these elaborate provisions of Section 3779, enacted in 1945, authorizing an extension in payment of an earlier year's tax, become meaningless; under the pre-existing law the taxpayer in this case has obtained a two years' extension of its taxes,[16] without any formality, such as filing the detailed statement required under Section 3779 (b), and without payment of 3 percent interest on the amount of 1941 taxes abated by the carry-back or any interest at

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[14] Thus, Treasury Regulations, promulgated to carry out the provisions of Section 3779, provide: "SEC. 474.9. INTEREST.—Interest is payable on any amount the time for payment of which is extended under section 3779." T. D. 5498, 1946-1 Cum. Bull. 209, 218.

[15] It is settled that subsequent legislation and legislative history may properly be considered to assist in interpretation of prior legislation upon the same subject. *Brewster* v. *Gage*, 280 U.S. 327, 337; *Burnet* v. *Guggenheim*, 288 U.S. 280, 283; *United States* v. *Stewart*, 311 U.S. 60, 64; *Neuberger* v. *Commissioner*, 311 U.S. 83, 89-90; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *Commissioner* v. *Lamont*, 156 F. 2d 800, 804 (C.A. 2d), certiorari denied, 329 U.S. 782.

[16] In fact, the only taxes the time for payment of which, under Section 3779, may be extended are those of the year *immediately preceding* the year of the expected loss.

all. The decision below must also authorize such extension without interest in favor of individuals, thus draining of sense the careful Congressional limitation in Section 3779 of the extension privilege to corporate taxpayers. In brief, Section 3779 clearly establishes that Congress, in 1945, contemplated that the tax for an earlier year was due and payable even though later abated by a carry-back, and that, contrary to the holding of the court below, the carry-back did not *ab initio* relieve the taxpayer of liability therefor; otherwise no provision for an "extension" would have been necessary.[17]

The result reached in the court below implies an incredible willingness on the part of Congress to endanger the prompt collection of the revenue and to ignore "the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated

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[17] Congress clearly indicated that the extension privilege was intended primarily for that part of the earlier year's taxes subject to abatement by carry-back, since it imposed a 5 percent penalty when the amount of the taxes extended under Section 3779 substantially exceeded the amount abated by carry-backs. See Section 294 (e) of the Internal Revenue Code added by Section 4 (b) of the Tax Adjustment Act of 1945, *supra*. (H. Rep. No. 849, *supra*, p. 20 (1945 Cum. Bull. 566, 579)). Moreover, significantly, the Committee observed (H. Rep. No. 849, *supra*, pp. 20-21 (1945 Cum. Bull. 566, 579-580)):

> It is to be noted that a taxpayer may always avoid the penalty imposed under section 294 (e) by paying the tax, the time for payment of which has been extended, at any time prior to the close of the taxable year in which the extension was made. In such case, *interest will be payable at the rate of 6 percent per annum* but there will be no penalty of 5 percent. [Italics supplied.]

expenditures." *Rodgers* v. *United States*, 332 U. S. *supra*, p. 374. Such loose treatment of the needs of the federal fisc is belied by the careful provisions for interest on unpaid taxes contained in the Internal Revenue Code and other additions to tax on account of deficiency and non-payment (Sections 291-298, 26 U. S. C. 1946 ed., Secs. 291-298). The decision below tends to encourage speculation on the part of the irresponsible and unscrupulous at the expense of the Government and the general body of law abiding citizens who obey the mandate of the statute and choose not to affect a Cassandra-like gift of divination revealing the occurrence of operating business losses two years hence.[18]

D. *The respondent's claim is barred on legal and equitable principles alike.*—Congress has entered into no contract with taxpayers to allow a carry-back for all future years; the public interest, urgent necessities of the revenue may require its repeal before becoming operative as to a given earlier tax year. In the meantime, Congress intends that taxes be regularly and promptly paid. Thus, in *Miller* v. *Commissioner*, 115 F. 2d 479, certiorari denied, 312 U. S. 703, the Court of Appeals for the Ninth Circuit held that the repeal by a later Act of the carry-over provision of a loss

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[18] Indeed, here, the abating carry-back was mere coincidence and the deficiencies could not have been due to anticipation of net operating losses, since the carry-back provision, as already noted, *supra*, pp. 14-15, was not enacted until approximately ten months after the 1941 tax was payable.

suffered in an earlier year was valid. The court said (p. 480):

> The provision contained in the Revenue Act of 1932, permitting the carrying forward of a net loss, was a matter of legislative grace. It was within the power of Congress to revoke the privilege.

Again, here also, the carry-back, being solely dependent upon legislative grace is not to be extended beyond clear provision. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440; *White* v. *United States,* 305 U. S. 281, 292; *Deputy* v. *duPont,* 308 U. S. 488.

Moreover, an action such as that at bar to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the United States has money which belongs to it. An overpayment must appear before refund is authorized; although at law, such an action is equitable in function. It is predicated upon rights equitable in nature, to avoid unjust enrichment by the defendant at the expense of the plaintiff, and it is controlled by equitable principles. *Lewis* v. *Reynolds,* 284 U. S. 281; *Stone* v. *White,* 301 U. S. 532, rehearing denied, 302 U. S. 777. Here taxpayer defaulted in the obligation imposed by the statute to pay its taxes when due in 1941. The Government's retention of compensation for the delayed payment does not constitute unjust enrichment. Since the tax-

payer has no equity, the Collector's legal title should prevail on familiar principles. *Champ Spring Co.* v. *United States*, 47 F. 2d 1, 3 (C. A. 8th), certiorari denied, 283 U. S. 852; *123 East Fifty-Fourth Street* v. *United States*, 157 F. 2d 68 (C. A. 2d).

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [As added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U. S. C. 1946 ed., Sec. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return

should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. 1946 ed., Sec. 56.)

SEC. 122 [As added by Sec. 211 (b) of the Revenue Act of 1939, supra]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) [As amended by Sec. 153 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Amount of Carry-Back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

26 U. S. C. 1946 ed., Sec. 122.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is

made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U. S. C. 1946 ed., Sec. 271.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2 (a) of the Act of December 17, 1943, c. 346, 57 Stat. 601] *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed * * *.

(26 U.S.C. 1946 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT.

(a) *Tax Shown on Return.*

(1) *General Rule.*—Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or in-

stallment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272 (i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(26 U.S.C. 1946 ed., Sec. 294.)

SEC. 710 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

* * * * *

(c) [As added by Sec. 2 (b) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and amended by Sec. 204 of the Revenue Act of 1942, *supra*]. *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

* * * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused excess profits carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the de-

duction of the specific exemption provided in subsection (b) (1).

* * * * *

(26 U.S.C. 1946 ed., Sec. 710.)

SEC. 711 [As added by Section 201 of the Second Revenue Act of 1940, *supra*]. EXCESS PROFITS NET INCOME.

(a) *Taxable years beginning after December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year, except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [As added by Sec. 210 (a) of the Revenue Act of 1942, *supra*] *Net operating loss deduction adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this

subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; and

* * * * *

(26 U.S.C. 1946 ed., Sec. 711.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

(1) *Credits.*—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) *Refunds.*—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the

taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

* * * * *

(e) [As added by Sec. 153 (d) of the Revenue Act of 1942, *supra*] *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier.

(26 U.S.C. 1946 ed., Sec. 3771.)

SEC. 3779. [As added by Section 4 (a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517]. EXTENSIONS OF TIME FOR PAYMENT OF TAXES BY CORPORATIONS EXPECTING CARRY-BACKS.

(a) *In General.*—If a corporation, in any taxable year ending on or after September

30, 1945, files with the collector a statement, as provided in subsection (b), with respect to an expected net operating loss carry-back or unused excess profits credit carry-back from such taxable year, the time for payment of all or part of any tax imposed by chapter 1 or 2 for the taxable year immediately preceding such taxable year shall be extended, to the extent and subject to the conditions and limitations hereinafter provided in this section.

(b) *Contents of Statement.*—The statement with respect to an expected carry-back referred to in subsection (a) of this section shall be sworn to in the manner prescribed by section 52 in the case of a return and shall be filed at such time and in such manner and form as the Commissioner, with the approval of the Secretary, may by regulations prescribe. Such statement shall set forth that the corporation expects to have a net operating loss carry-back, as provided in section 122 (b), or an unused excess profits credit carry-back, as provided in section 710 (c)(3), from the taxable year in which such statement is made, and shall set forth, in such detail and with such supporting data and explanation as such regulations shall require—

(1) the estimated amount of the expected net operating loss or unused excess profits credit;

(2) the reasons, facts, and circumstances which cause the corporation to ex-

pect such net operating loss or unused excess profits credit;

(3) the amount of the reduction, attributable to the expected carry-back, in the aggregate of the taxes previously determined for all taxable years affected by the carry-back prior to the taxable year of the expected loss or unused credit; such taxes previously determined being ascertained in accordance with the method prescribed in section 3801 (d); and such reduction being determined by applying the expected carry-back in the manner provided by law to the items on the basis of which such taxes were determined but such reduction being decreased by the amount of any credits under section 780 properly allocable to such reduction;

(4) the tax or taxes and the amount thereof the time for payment of which is to be extended; and

(5) such other information for the purpose of carrying out the provisions of this section as may be required by such regulations.

The collector shall, upon request, furnish a receipt for any statement filed, which shall set forth the date of such filing.

(c) *Amount to Which Extension Relates and Installment Payments.*—The amount the time for payment of which may be extended under subsection (a) with respect to

any tax shall not exceed the amount of such tax shown on the return, increased by any amount assessed as a deficiency (or as interest or additions to the tax) prior to the date of filing the statement and decreased by any amount paid or required to be paid prior to the date of such filing; and the total amount of the taxes the time for payment of which may be extended shall not exceed the amount stated under clause (3) of subsection (b). For the purposes of this subsection, an amount shall not be considered as required to be paid unless shown on the return or assessed as a deficiency (or as interest or addition to the tax), and an amount assessed as a deficiency (or as interest or additions to the tax) shall be considered to be required to be paid prior to the date of filing of the statement if the tenth day after notice and demand for its payment occurs prior to such date. If an extension of time under this section relates to only a part of a tax, the time for payment of the remainder shall be considered to be the dates on which payments would have been required if such remainder had been the tax and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b).

(d) *Period of Extension.*—The extension of time for payment provided in this section shall expire—

(1) on the last day of the month in which falls the last date prescribed by law

(including any extension of time granted the taxpayer) for the filing of the return for the taxable year of the expected net operating loss or unused excess profits credit, or

(2) if an application for tentative carry-back adjustment provided in section 3780 with respect to such loss or unused credit is filed before the expiration of the period prescribed in clause (1), on the date on which notice is mailed by registered mail by the Commissioner to the taxpayer that such application is allowed or disallowed in whole or in part.

(e) *Revised Statements.* — Each statement filed under subsection (a) with respect to any taxable year shall be in lieu of the last statement previously filed with respect to such year. If the amount the time for payment of which is extended under a statement filed is less than the amount under the last statement previously filed the extension of time shall be terminated as to the difference between the two amounts.

(f) *Termination by Commissioner.*—The Commissioner is not required to make any examination of the statement, but he may make such examination thereof as he deems necessary and practicable. The Commissioner shall terminate the extension as to any part of the amount to which it relates which he deems should be terminated because, upon such examination, he believes that, as of the time such examination is made, all or

any part of the statement clearly is in a material respect erroneous or unreasonable.

(g) *Payments on Termination.*—If an extension of time is terminated under subsection (e) or (f) with respect to any amount, then—

(1) no further extension of time shall be made under this section with respect to such amount, and

(2) the time for payment of such amount shall be considered to be the dates on which payments would have been required if there had been no extension with respect to such amount and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b).

(h) *Jeopardy.*—If the Commissioner believes that collection of the amount to which an extension under this section relates is in jeopardy, he shall immediately terminate such extension and notice and demand shall be made by the collector for payment of such amount.

(i) *Interest.*—In the case of an amount the time for payment of which has been extended, there shall be collected as part of such amount interest from the dates on which payments would have been required if there had been no extension and the taxpayer had elected to pay the tax in four equal instalments as provided in section 56 (b)—

(1) upon so much of such amount as is satisfied under section 3780 (b) by apply-

ing or crediting thereto, within the period of extension, a decrease in tax determined in connection with an application under section 3780 (a), interest at the rate of 3 per centum per annum to the date of such satisfaction, except that on so much of such satisfied amount as is not in excess of the amount of the deficiencies assessed under section 3780 (b) and which is not so satisfied, the rate shall be 6 per centum per annum; and

(2) upon the remainder of the amount the time for payment of which has been extended, interest at the rate of 6 per centum per annum to the date such amount is paid.

If the Commissioner determines that during the period of extension credit or refund of an overpayment has been allowed or made, or a deficiency assessed, affecting the amount to which the extension relates and that the taxpayer could not have taken such overpayment or deficiency into account in the statement or a revised statement, appropriate adjustment shall be made in the interest.

(26 U. S. C. 1946 ed., Sec. 3779.)

SEC. 3780 [As added by Section 4 (a) of the Tax Adjustment Act of 1945, *supra*]. TENTATIVE CARRY-BACK ADJUSTMENTS.

(a) *Application for Adjustment.*—A taxpayer may file an application for a tentative carry-back adjustment of the taxes for prior taxable years affected by a net operating loss carry-back, provided in section 122 (b), or an unused excess profits credit carry-back, provided in section 710 (c)(3), from any taxable year ending on or after September 30, 1945. The application shall be verified in the manner prescribed by section 51 or section 52 in the case of a return of such taxpayer, and shall be filed, on or after the date of filing of the return for the taxable year of the net operating loss or unused excess profits credit from which the carry-back results and within a period of twelve months from the end of such taxable year, in the manner and form required by regulations prescribed by the Commissioner with the approval of the Secretary. The application shall set forth, in such detail and with such supporting data and explanation as such regulations shall require—

(1) the amount of the net operating loss or unused excess profits credit;

(2) the amount of the tax previously determined for each prior taxable year affected by such carry-back; the tax previously determined being ascertained in accordance with the method prescribed in section 3801 (d);

(3) the amount of increase or decrease in each such tax, attributable to such carry-back; such increase or decrease being determined by applying the carry-back in the manner provided by law to the items on the basis of which such taxes were determined. If an application under section 124 (j) for tentative adjustment of tax with respect to amortization has been previously filed but such adjustment has not been previously determined, then for the purposes of this section the assessments, applications, credits, and refunds provided for in section 124 (k) shall be considered as having previously been made upon the basis of such application under section 124 (j);

(4) the amount by which the aggregate of such decreases exceeds the aggregate of such increases;

(5) the unpaid amount of each such tax, not including any amount required to be shown under paragraph (6);

(6) the amount, with respect to each tax for the taxable year immediately preceding the taxable year of such loss or unused credit, as to which an extension of time for payment under section 3779 is in effect; and

(7) such other information for the purposes of carrying out the provisions of this section as may be required by such regulations.

An application under this subsection shall not constitute a claim for credit or refund.

(b) *Allowance of Adjustments.*—Within a period of ninety days from the date on which an application for a tentative carry-back adjustment is filed under subsection (a), or from the last day of the month in which falls the last date prescribed by law (including any extension of time granted the taxpayer) for filing the return for the taxable year of the net operating loss or unused excess profits credit from which such carry-back results, whichever is the later, the Commissioner shall make, to the extent he deems practicable in such period, a limited examination of the application, to discover omissions and errors of computation therein, and shall determine the amount of the increase or decrease in each tax attributable to such carry-back upon the basis of the application and the examination, except that the Commissioner may disallow, without further action, any application which he finds contains errors of computation which he deems cannot be corrected by him within such ninety-day period or material omissions. Each such increase shall be deemed determined as a deficiency and shall be assessed, without regard to the restrictions on assessment in section 272. Each such decrease shall be applied against any unpaid amount of the tax decreased (including any amount of such tax as to which an extension of time under section 3779 is in effect) and any remainder shall be credited—

(1) against the deficiencies (and additions to the tax) assessed under this subsection,

(2) against any unsatisfied amount of any tax for the taxable year immediately preceding the taxable year of the net operating loss or unused excess profits credit the time for payment of which tax is extended under section 3779, and

any remainder shall, within such ninety-day period, be either credited against any income, war profits, or excess profits tax or instalment thereof then due from the taxpayer, or refunded to the taxpayer. The application, credit or refund of a decrease determined under this subsection shall be deemed a credit or refund of an overpayment within the meaning of sections 781 (b) and 3807 (b) (1).

(c) *Assessment of Erroneous Allowances.*—If the Commissioner determines that the amount applied, credited or refunded under subsection (b) is in excess of the overassessment attributable to the carry-back with respect to which such amount was applied, credited or refunded, he may assess the amount of the excess as a deficiency as if it were due to a mathematical error appearing on the face of the return, as provided in section 272 (f). Upon making such assessment, the Commissioner shall schedule as an overassessment the decrease in any other tax resulting from the adjustments reflected in the computation of the deficiency.

(26 U.S.C. 1946 ed., Sec. 3780.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~[illegible]~~ 70

JOHN E. MANNING, as Collector of Internal Revenue for the Fifth District of New Jersey,

Petitioner,

v.

SEELEY TUBE & BOX COMPANY, a corporation of the State of New Jersey,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 787.

JOHN E. MANNING, as Collector of Internal Revenue for the Fifth District of New Jersey,

Petitioner,

v.

SEELEY TUBE & BOX COMPANY, a corporation of the State of New Jersey,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Opinion Below.

The opinion of the District Court (R. 5-10) is reported in 76 F. Supp. 937. The opinion of the Court of Appeals (R. 13-17) is reported in 172 F. (2d) 77.

Question Presented.

The Commissioner of Internal Revenue in 1943 assessed amounts as deficiencies in the 1941 income and excess profits taxes of the taxpayer (respondent), plus interest thereon, which amounts were never collected or finally determined to be correct. When the taxpayer's operating loss for 1943 (which caused a net operating loss carry-back deduction for

1941 as provided in Sections 23(s) and 122(a) and (b) of the Internal Revenue Code) was determined, it was large enough to eliminate the taxpayer's net income for 1941 and the tax deficiencies for 1941 were abated.

The question presented is whether the petitioner (Collector) is entitled to collect interest upon such amounts assessed as deficiencies but never collected and which were finally determined not to be payable.

Statutes Involved.

The pertinent statutory provisions are printed in the appendix to this brief.

Statement.

The facts are not in dispute. Using round figures, they may be summarized as follows:

The taxpayer (respondent) timely filed its 1941 returns and timely paid $44,900 in taxes on its income for 1941 (R. 2, 3). Thereafter, on July 7, 1943, the taxpayer was adjudged a bankrupt and the Commissioner of Internal Revenue on August 2, 1943, pursuant to the provisions of Section 274(a) of the Internal Revenue Code (set forth in the appendix to this brief), assessed deficiencies aggregating $47,800 in taxes upon the taxpayer's income for 1941, plus interest thereon of $4,500 (R. 3). The amounts assessed as deficiencies were never paid (R. 6).

On March 3, 1944, the taxpayer timely filed its 1943 returns which disclosed a large net operating loss. It was agreed by the Commissioner of Internal Revenue and the taxpayer that the taxpayer's net operating loss for 1943 resulted in a net operating loss deduction under Section 23(s) of the Internal Revenue Code for the year 1941 suffi-

cient to result in the taxpayer's not having any net income for 1941 (R. 4, 5).

On March 15, 1944, the taxpayer filed with the petitioner claims for refund for the $44,900 in taxes on its 1941 income as shown upon its return and which it had paid (R. 4).

On February 9, 1945, the Commissioner of Internal Revenue abated the deficiencies in the amount of $47,800 what he had assessed in 1943 but never collected. He also at that time issued a certificate of overassessment with respect to the $44,900 of tax paid by the taxpayer upon its 1941 return. The Commissioner, however, refused to refund the entire amount of such $44,900 of tax, but refunded only $40,400 and retained the remainder amounting to $4,500 as "interest" upon the "deficiencies" in tax of $47,800 which had been assessed in 1943, had never been collected or finally determined to be due, and which had been abated in 1945 (R. 5).

The question involved in this suit is whether, under the Internal Revenue Code, interest upon a "deficiency" in tax may be collected where the "deficiency" itself may not be collected because it is not due.

The District Court held that interest might be collected from the taxpayer upon a "deficiency" even though the deficiency itself could not be collected from the taxpayer (R. 5-10). The Court of Appeals reversed the District Court and unanimously held that where the "deficiency" could not be collected because it was not due, interest could not be collected (R. 13-17).

Argument.

1. The collection of interest upon deficiencies in tax is governed by statute, namely, Section 292(a) of the Internal Revenue Code (set forth in the appendix to this brief).

This case presents a question of construction of the plain language of the statute.

Section 292(a) of the Code provides that interest upon a deficiency "shall be collected as a part of the tax". The tax portion of the deficiency in this case was never collected, but was abated (R. 7). It is therefore impossible for the Collector in this case to comply with the mandate of the statute as to the collection of interest. There is, therefore, under the express terms of the statute, no interest collectible.

The petition for certiorari sets forth that the issue involved in this case is involved in many thousands of other cases and that a large amount of interest revenue is at stake. It is hardly likely, however, that any appreciable number of the other cases involve a case, like the instant one, where the tax deficiency was never determined to be correct and was not collected by the Government. As the statute clearly provides for the collection of interest "as a part of the tax", there is no statutory authority for its collection here.

The instant case in that regard is unlike *Brandtjen & Kluge, Inc.* v. *United States,* 78 F. Supp. 509 (D. Minn., 1948), cited at page 7 of the petition. There the Government *collected* the assessed deficiency in tax plus interest, as it was given the power to do under Section 292(a). The Government subsequently refunded the entire tax and the taxpayer sued for a refund of the interest. While we believe that the decision in the *Brandtjen & Kluge* case was incorrect, it differs from the instant case radically in that there the Government did have statutory authority for the collection of the interest and the only question was whether it was refundable. In the instant case there is no statutory authority for the collection of the interest, as the tax itself was never collected.

2. Even if one were to assume that the instant case and the *Brandtjen & Kluge* case were similar, the statute requires the conclusion that interest may not be collected from the taxpayer with respect to a tax "deficiency" which has been abated. Section 271(a) of the Internal Revenue Code (set forth in the appendix to this brief) defines the term "deficiency" as being the "amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return". The "tax imposed" by the Internal Revenue Code for 1941 upon the taxpayer was zero, and the Commissioner of Internal Revenue issued a certificate of overassessment for the entire amount of such tax. That was proper since the taxpayer's deductions were in excess of its gross income and it did not have any net income which was subject to the tax. As the "tax imposed" for 1941 was zero, there can, by definition, be no "deficiency" upon which interest is payable.

The petitioner claims that, although the taxpayer's net operating loss for 1943 is expressly made a deduction for the year 1941 by Sections 23(s) and 122(a) and (b) of the Internal Revenue Code* (set forth in the appendix to this brief), the deduction should not be treated like other deductions, once its amount has been ascertained. There is not anything, however, in the wording of Section 23 of the Internal Revenue Code which indicates that the deduction under Section 23(s) is to be treated differently from that under any other section. Section 23 of the Code provides

* The carry-back provisions were put into the Internal Revenue Code by Section 153 of the Revenue Act of 1942, 56 Stat. 798, 847, which was approved on October 21, 1942, and by its terms was applicable to taxable years beginning after December 31, 1940. Accordingly, when the "deficiency" in the instant case was assessed on August 2, 1943, the carry-back provisions were in the law, and the taxpayer's liability for tax was "inchoate", as stated by the Court of Appeals (R. 16).

that the deduction under Section 23(s) "shall be allowed" in computing net income.

The Congress, in enacting the carry-back of loss provisions of the Internal Revenue Code, recognized that some change in respect of the ordinary rules relating to the payment of interest should be made in the light of the fact that the carry-back deduction might not be determined for several years after the return for a particular year was filed. It accordingly enacted Section 3771(e) of the Internal Revenue Code (set forth in the appendix to this brief) and provided that the Government should be relieved, for any period prior to the filing of a claim for refund of tax, from any obligation to *pay* interest on a refund in tax arising from a carry-back of net operating loss. The enactment of Section 3771(e) shows clearly that Congress had the problem of interest in mind in connection with carry-back deductions. It is significant that Congress did not attempt to make any change in the rules with respect to the *refund,* together with the tax, of any interest which a taxpayer had paid upon a deficiency in tax, when the deficiency was extinguished by reason of the carry-back of operating loss. The failure of Congress to enact a statutory provision of that character is particularly significant in view of the fact that the same problem arose under the Revenue Act of 1918, 40 Stat. 1057, and was decided administratively by the Bureau of Internal Revenue in favor of the taxpayer.

Section 204(b) of the Revenue Act of 1918 provided for a net loss carry-back. The Bureau of Internal Revenue ruled that a subsequent determination of a net loss for a succeeding taxable year, which required a carry-back and, hence, a reduction in the tax liability previously assessed,

did not affect the general rule that when a tax assessed as a deficiency is refunded, any interest paid with respect to the assessment of such deficiency must also be refunded. L. O. 1115, II-2 C. B. 221 (1923). In that ruling, the Bureau of Internal Revenue carefully considered the question and held that interest paid with respect to a tax which was wiped out by a carry-back of loss from a later year must be refunded since, if there is no tax, there cannot be any interest. That ruling further held that even a fraud penalty is extinguished if a subsequent determination arising out of the operation of a carry-back of loss shows no tax deficiency. The conclusion of that ruling (L. O. 1115) is as follows:

> "It is held: (1) Where a return contains a fraudulent understatement of tax and there is therefore a deficiency in the tax, but the deficiency is wiped out by applying the deduction allowable under section 204 of the Revenue Act of 1918, the *ad valorem* fraud penalty provided in section 250(b) of said Act is not applicable since upon the redetermination under section 204 of the Act there is no deficiency within the meaning of section 250(b); (2) where a tax is assessed and collected, together with the 5 per cent penalty and interest at the rate of 1 per centum per month, provided in section 250(e) for failure to pay within 10 days after notice and demand by the collector, and by reason of a redetermination as provided in section 204 the tax is reduced and a portion refunded, so much of the penalty and interest made a part of the tax by section 250(c) as is applicable to the amount of the tax refunded may be credited or refunded as excessive, as provided in section 252; (3) Solicitor's Opinion 96 is modified to accord with the above."

It has, of course, long been held by the courts and ruled by the Bureau that interest paid as part of a deficiency assessment for a taxable year is refundable when it is later determined that the deficiency was not payable, as interest is regarded as an accretion to and a part of the tax in connection with any refund or credit of the tax. *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721 (C. C. A. 8th, 1931); *Phelps* v. *United States*, 105 F. (2d) 904 (C. C. A. 2nd, 1939); *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769 (C. C. A. 10th, 1932); I. T. 1447, I-2 C. B. 220 (1922).

The Treasury ruling just cited (I. T. 1447) states that "interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax".

The petitioner argues, in effect, that since Section 3771(e) of the Code relieves the Government under certain circumstances from *paying* interest to the taxpayer on an overassessment resulting from an operating loss deduction, the Government is authorized to *collect* interest from the taxpayer upon the expunged deficiency. Had Congress intended to permit the latter, it could easily have inserted an appropriate provision to that effect in the Internal Revenue Code. Throughout the petition, an attempt has been made to convey to this Court the impression that (1) *refunding* by the Commissioner of interest theretofore paid by the taxpayer on a deficiency and (2) *payment* by the Commissioner of interest out of Government funds on an overpayment made by the taxpayer are treated alike in law. They are, of course, wholly different. That Section 3771(e) of the Code denies to the taxpayer under certain circumstances the right to receive interest on an overpayment does not have any effect upon the tax-

payer's right to recover any interest which he has paid to the Government and which is a part of the *overpayment itself.*

The petitioner's argument couples refunding of interest to the taxpayer with payment of interest by the Government as if the two were the same, although the Internal Revenue Code very carefully distinguishes between interest payable by a taxpayer and interest payable by the Government. Section 292 of the Code is entitled "Interest on Deficiencies" whereas Section 3771 is entitled "Interest on Overpayments". The former relates only to interest to be paid *by a taxpayer* where there is a deficiency in tax; the latter relates solely to interest to be paid *by the Commissioner* out of Government funds on an overpayment, which includes the tax principal and interest, if any, paid as a part of such tax. Those two sections do not relate to each other, and Section 3771(e) (which deals solely with interest on overpayments) neither authorizes the Government to retain a portion of an overassessment of tax as interest nor to collect interest. The fact that interest may not be collected from the Government on an overpayment of tax does not mean that the Commisisoner may either retain interest paid by a taxpayer or collect interest from him.

For example, suppose that in 1943 a taxpayer pays a deficiency in 1941 income tax of $100 plus $12 interest (two years at 6% per annum under Section 292 of the Code). In 1948, such deficiency is determined to be erroneous. Section 3771(a) (set forth in the apendix to this brief) of the Code provides that the Government shall pay interest at 6% per annum on the $112 (the amount of the overpayment) for the five years (1943 to 1948) that it has kept the money. Section 3771(e) of the Code merely adds

the further proviso that if the refund arises from the operation of the carry-back of loss provisions, the Government's obligation to pay 6% interest on the overpayment ($112) does not begin until a claim for the refund of such $112 overpayment has been made. Section 3771(e) does not in any way reduce the amount of the overpayment ($112); it simply deals with the computation of interest payable upon such $112. The only application of Section 3771(e) to the instant case is that the Government is required to pay the taxpayer interest on the overpayment of $4,500 for which this suit was brought, only for the period beginning March 15, 1944, the date of the filing of the claim for refund thereof by the taxpayer (R. 4).

The petitioner's argument is apparently based upon the contention that in the instant case a carry-back of loss from 1943 is not to be regarded as a proper deduction of the prior year 1941, *nunc pro tunc*. Not only is there no statutory authority for such a position, but the Commissioner does not adhere to that position in other circumstances.

For instance, the Commissioner takes the position in Treasury Regulations 111, Section 29.122-4(c)(4) that a deduction which is limited in amount to a percentage of the taxpayer's net income shall be recomputed when a loss is carried back from a succeeding year. That means that if a corporate taxpayer had net income shown on its return for 1943 of $100,000 and had deducted $5,000 for charitable contributions in that year under the 5% limitation provision contained in Section 23(q) of the Code, and then had a net operating loss of $90,000 in 1945 which, by reason of the carry-back became an additional deduction in 1943, the Commissioner would compel it to reduce its deduction for charitable contributions to 5% of the true net income figure of $10,000, namely, $500.

Moreover, in a situation converse to that presented in the instant case, it is understood that the Commissioner took the position that the carry-back applied *nunc pro tunc* and Congress in amending the statute recognized that it so applied. That situation arose in connection with the unused excess profits credit carry-back provided by Section 710(c)(3)(A) of the Code (set forth in the appendix to this brief). There, if a taxpayer corporation had an unused excess profits credit for 1944 which was carried back to the year 1942, the effect was to reduce the excess profits tax payable but at the same time to *increase* the income tax payable. Under those circumstances, it is understood that the Commissioner ruled that interest would be collectible *from the original due date of the tax* upon the deficiency in income tax for 1942 arising from the carry-back of unused excess profits credit from 1944 to 1942. The Congress recognized that such was a proper construction of the statute, saying in the Report of the Ways and Means Committee on the Tax Adjustment Act of 1945 (Report No. 849, 79th Cong., 1st Sess., page 33):

> "Interest on such deficiency, under present law, is payable from the date prescribed for the payment of the tax or, if the tax is paid in installments, from the date prescribed for the payment of the first installment."

In order to correct that situation, the Congress, by Section 6(a) of the Tax Adjustment Act of 1945, 59 Stat. 517, added Section 292(c) to the Internal Revenue Code (set forth in the appendix to this brief) which specifically provided that if a deficiency in tax be *caused* by a carry-back, then no interest shall be payable upon the deficiency except for such period that the Commissioner would be required to pay interest on an overpayment pursuant to Section 3771(e) of the Code.

If, without an amendment to Section 292, a carry-back was deemed by the Congress to accrue *nunc pro tunc* in the earlier year for the purpose of computing interest upon a deficiency which was *caused* by the carry-back, then the carry-back should also be deemed to accrue *nunc pro tunc* in the prior year for the purpose of abatement of interest upon a deficiency which is *eliminated* by a carry-back. If the Congress wishes to change that rule, it may do so by a further amendment to Section 292 of the Internal Revenue Code.

The petitioner states (Pet. 8) that if the taxpayer does not pay interest upon the "deficiency" which was abated because of the carry-back, he is in a better position than a taxpayer similarly situated who would have paid a larger tax at the time of filing his original return but who would be entitled to interest from the Government upon his refund under Section 3771(e) of the Code only from the date of filing a claim for refund thereof. That, of course, assumes that the "deficiencies" were properly payable, as to which point there was never any final determination. There is not any implication in the record, however, that the taxpayer in the instant case did not honestly file its return, or that the taxpayer in any way attempted to anticipate upon its return any operating loss deduction which it might receive because of a loss occurring two years later. The situation of which the Government complains was caused entirely by statute, namely, the enactment of Section 3771(e) of the Code which prevented the taxpayer from collecting interest from the Government on refunds arising from carry-backs for the period prior to the filing of a claim for refund thereof. If the Congress wishes to deal with the question of the payment by the taxpayer of interest upon "deficiencies" which are eliminated by carry-backs, it may do so by an appropriate amendment of Section 292 of the Code.

The Government's position in this case would create a much worse inequity than that of which it complains. It would make a taxpayer's liability for interest depend upon when its return was audited and additional tax assessed. If the return is audited and a tax deficiency with interest is assessed before the amount of the carry-back deduction has been determined, as happened in the instant case because of the taxpayer's bankruptcy, then the petitioner claims that interest is payable by the taxpayer upon such deficiency and not refundable to it. But the prompt assessment which occurred in the instant case is permitted only in a very limited class of cases of which a taxpayer in bankruptcy is one. In the ordinary case before an assessment of a deficiency in tax can be made, the taxpayer must be given an opportunity to take his case to the Tax Court of the United States under Section 272(a)(1) of the Internal Revenue Code (set forth in the appendix to this brief). There, if the taxpayer desires, the tax for the particular year in question may be determined and effect given to the operating loss deduction which is allowable for the particular year in view of the carry-back of operating loss from subsequent years. *Birch Ranch & Oil Company*, 7 T. C. M. 152 (Tax Court Memorandum Decision, March 24, 1948). Accordingly, in the ordinary case, a taxpayer can, by filing a petition with the Tax Court, in connection with a contest of a proposed deficiency, prevent the assessment of tax by the Commissioner until the amount of the net operating loss carry-back deduction has been determined, and can obtain a final decision that no tax is due. Moreover, the same result would follow if the taxpayer's return had not been audited promptly by the Government but had been audited in connection with its returns for 1942 and 1943. If the carry-back of operating loss was

determined in connection with the audit of the 1941 return, then no deficiency for 1941 would ever be assessed by the Commissioner of Internal Revenue. The petitioner's position in this case therefore discriminates against taxpayers against whom, for some reason such as bankruptcy, the Commissioner is permitted to make an immediate assessment of a tax deficiency and also bears differently upon taxpayers depending upon whether their returns are promptly audited or whether there is a delay in audit until the amount of the carry-back loss has been determined, so that no deficiency would ever be assessed.

3. The Court of Appeals in the instant case has not rendered a decision in conflict with a decision of another Court of Appeals. On the contrary, the decision of the Court of Appeals is in harmony with the rule laid down by the Courts of Appeals for the Second, Eighth and Tenth Circuits to the effect that the refund of a deficiency in tax should carry with it any interest paid by the taxpayer in connection with that deficiency. *Phelps* v. *United States*, 105 F. (2d) 904 (C. C. A. 2nd, 1939); *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721 (C. C. A. 8th, 1931); *Colorado Milling & Elevator Co.* v. *Howbert*. 57 F. (2d) 769 (C. C. A. 10th, 1932), *supra*. *Brandtjen & Kluge, Inc.* v. *United States*, 78 F. Supp. 509 (D. Minn., 1948), relied upon by the petitioner, is a District Court decision (decided before the decision of the Court of Appeals in the instant case) which relies upon the opinion of the District Court in the instant case prior to its reversal. There is no reason to believe that a Court of Appeals will depart from the well-established rule that interest paid upon a deficiency must be refunded if the deficiency is refunded, unless the Congress changes the Internal Revenue Code so to provide.

Conclusion.

There is no conflict of decisions. The instant case was correctly decided in accordance with the controlling statute and decisions. The petition for a writ of certiorari should therefore be denied.

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Appendix.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(s) *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * * * *

SEC. 122. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operation Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of Carry-back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * * * *

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer

upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

* * * * * *

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

* * * * * *

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate Assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272(a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

* * * * * *

SEC. 292. INTEREST ON DEFICIENCIES.

(a) *General Rule*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the

collector, and shall be collected as a part of the tax, at the rate of 6 percentum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, • • •.

• • • • • •

(c) *Deficiency Resulting From Carry-Back and Related Matters.*—If any part of a deficiency is determined by the Commissioner to be attributable (A) to a carry-back to which an overpayment described in section 3771 (e), or a decrease determined under section 3780 (b), in any other tax is attributable, or (B) to an error in the amount or effect of a carry-back which resulted in a credit or refund of an overpayment with interest computed pursuant to section 3771 (e), or in a decrease determined under section 3780 (b), no interest shall be assessed or paid under subsection (a) with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment or for a period prior to the application of such decrease.

• • • • • •

SEC. 710. IMPOSITION OF TAX.

• • • • • •

(c) *Unused Excess Profits Credit Adjustment.*—

• • • • • •

(3) *Amount of Unused Excess Profits Credit Carry-Back and Carry-Over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year

computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in sub-section (b) (1).

* * * * * *

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

* * * * * *

(e) *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 70

70

JOHN E. MANNING, as Collector of Internal Revenue for the Fifth District of New Jersey,

Petitioner,

v.

SEELEY TUBE & BOX COMPANY, a corporation of the State of New Jersey,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

JOHN E. MANNING, as Collector of Internal Revenue for the Fifth District of New Jersey,

Petitioner,

v.

SEELEY TUBE & BOX COMPANY, a corporation of the State of New Jersey,

Respondent.

No. 70

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the District Court by Judge Smith (R. 5-10) is reported in 76 F. Supp. 937. The unanimous opinion of the Court of Appeals for the Third Circuit by Judge Goodrich (R. 13-17) is reported in 172 F. (2d) 77.

Jurisdiction

The judgment of the Court of Appeals was entered on December 20, 1948 (R. 12). By order of Mr. Justice Burton, dated March 5, 1949, the time within which a petition for a writ of certiorari might be filed was extended to and including May 18, 1949 (R. 18). The petition for a writ of certiorari was filed on May 12, 1949, and granted on June 27, 1949 (R. 20). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Question Presented

The Commissioner of Internal Revenue in 1943 assessed amounts as deficiencies in the 1941 income and excess profits taxes of the taxpayer (respondent), plus interest thereon, which amounts were never collected, paid or finally determined to be correct. The taxpayer's operating loss for 1943 resulted in a net operating loss carry-back deduction for 1941 (as provided in Sections 23(s) and 122(a) and (b) of the Internal Revenue Code) which was large enough to eliminate the taxpayer's net income for 1941. The Commissioner of Internal Revenue abated the tax deficiencies for 1941.

The question presented is whether the Collector (petitioner) is entitled to collect interest from the taxpayer upon such amounts assessed as deficiencies but finally determined by the Commissioner not to be payable and never collected.

Statutes Involved

The pertinent statutory provisions are printed in the Appendix to this brief.

Statement

The facts are not in dispute. Using round figures, they may be summarized as follows:

The taxpayer timely filed its 1941 returns and timely paid $44,900 in taxes on its income for 1941 in four equal quarterly installments (R. 2, 3). Thereafter, on July 7, 1943, it was adjudged a bankrupt and the Commissioner of Internal Revenue on August 2, 1943, pursuant to the provisions of Section 274(a) of the Internal Revenue Code (Appendix, p. iii), assessed deficiencies aggregating

$47,800 in taxes upon the taxpayer's income for 1941, plus interest thereon of $4,500 (R. 3). The amounts assessed as deficiencies were never paid (R. 6).

On March 3, 1944, the taxpayer timely filed its 1943 returns which disclosed a large net operating loss. It was agreed by the Commissioner of Internal Revenue and the taxpayer that the net operating loss for 1943 resulted, under the Internal Revenue Code, in a net operating loss deduction for the year 1941 sufficient to result in the taxpayer's not having any net income for 1941 (R. 4, 5).

On March 15, 1944, the taxpayer filed with the Collector claims for refund for the $44,900 in taxes on its 1941 income as shown upon its return and which it had paid (R. 4).

On February 9, 1945, the Commissioner of Internal Revenue abated the deficiencies in the amount of $47,800 which he had assessed in 1943 but never collected. He also at that time issued a certificate of overassessment with respect to the $44,900 of tax paid by the taxpayer upon its 1941 return. The Collector, however, refused to refund the entire amount of such $44,900 of tax, but refunded only $40,400 and retained the remainder, amounting to $4,500, as "interest" upon the "deficiencies" in tax of $47,800 which had been assessed in 1943, had never been collected or finally determined to be due, and which had been abated in 1945 (R. 5).*

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*As the Commissioner of Internal Revenue voluntarily abated the assessment of the deficiencies, the taxpayer did not have an opportunity to contest their correctness in Court (R. 5). The Collector is here asserting his claim for interest on those deficiencies by way of set-off or counterclaim against an amount of tax admittedly due to the taxpayer, and accordingly has the burden of proving that interest is due.

The question involved in this suit is whether, under the provisions of the Internal Revenue Code, interest may be collected upon an amount assessed as a "deficiency" in tax, but never collected because it is finally determined not to be payable.

The District Court (Smith, *J.*) held for the Collector (R. 5-10). The Court of Appeals reversed the District Court and, in a unanimous opinion by Judge Goodrich, held that where the "deficiency" could not be collected because it was not due, interest could not be collected (R. 13-17).

Summary of Argument

The Solicitor General takes the anomalous position that a taxpayer owes interest although admittedly he does not owe any tax. There is no authority in the Internal Revenue Code for such a contention. Interest cannot be collected on a non-existent debt.

Consistent administrative practice under the internal revenue laws for over thirty years has treated the liability for tax and interest as a single one; not as two liabilities, one for tax and one for interest. The only authority in the Code for the collection of interest is that it be collected "as a part of the tax" and when the tax is refunded any interest paid by the taxpayer thereon is also refunded. The Collector here disregarded both parts of that settled rule.

The Commissioner of Internal Revenue, in connection with the carry-back provisions of the Revenue Act of 1918, adopted the very position taken by the taxpayer here and ruled that where a tax deficiency which had been paid together with interest and penalties was wiped out by a carry-

back of loss, the tax, interest and penalties must be refunded. Thus the only published ruling of the Commissioner supports the taxpayer.

In determining a taxpayer's net income, a net operating loss deduction under Section 23(s) of the Code* is treated no differently than any other deduction provided for in the many subsections of Section 23. The Congressional mandate is that all such deductions "shall" be allowed in computing net income for a particular year (here 1941). No discretion is left to this Court or to any administrative official with respect to such allowance.

Not only has the Commissioner of Internal Revenue consistently ruled that the carry-back provisions operate *nunc pro tunc*, but the Congress has also recognized that fact in passing a 1945 amendment relating to the effect of those provisions. Moreover, deductions unallowable during a particular year, which later become allowable because of retroactive legislation, have consistently been held to be allowable *nunc pro tunc* by the Commissioner and the Courts. Any deficiencies in tax plus interest which were paid because of the disallowance of such deductions in prior years have been refunded to taxpayers in view of such subsequent retroactive legislation.

Section 3771(e), upon which the Solicitor General relies, is irrelevant to the instant case. That section does not entitle the Commissioner to *collect* interest *from* a taxpayer upon deficiencies in tax, but only relieves the Commissioner from *paying* interest *to* a taxpayer out of Government funds upon the refund of a tax payment. There may be a refund

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*All section references are to the Internal Revenue Code unless otherwise stated.

of tax without interest under Section 3771(e), but there cannot be a liability for interest where there is admittedly no liability for tax. A debt without interest is hardly as great a phenomenon as interest without a debt.

The carry-back deduction is an integral part of a determination of tax liability and is considered by the Courts in the determination of the proper tax liability of the earlier year. Thus the taxpayer's final 1941 tax liability could not be determined until recognition had been given to the net operating loss deduction arising from the carry-back from 1943 to 1941.

The fact situation of the instant case is not likely to arise very often. In only a few instances, of which a taxpayer in bankruptcy (like the present taxpayer) is one, is the Commissioner in a position to assess a tax deficiency for one year before the time when a carry-back of operating loss from a later year must be taken into account. In the normal situation a carry-back of operating loss is allowed at the same time as any other deduction permitted by law and the *assessment* of any deficiency upon which interest could be collected takes place only after all the relevant facts with respect to the carry-back are ascertained. The Solicitor General's position in this case discriminates against taxpayers against whom an immediate assessment of a tax deficiency is permitted (as in the instant case) prior to a judicial or other determination of the final tax liability for the year.

ARGUMENT

I. THE INTERNAL REVENUE CODE DOES NOT AUTHORIZE THE COLLECTION OF INTEREST IN THE ABSENCE OF TAX LIABILITY.

The taxpayer paid $44,900 as its tax for 1941. It was admittedly entitled to a refund of the full amount of that tax when the carry-back of its net operating loss from 1943 resulted in its having no net income for 1941 (R. 4, 7). Certificates of overassessment were issued in the full amount of the 1941 tax (R. 5, 7). The Collector, however, did not refund the full amount of the tax but withheld $4,500 and credited that amount against a like amount of interest which had been assessed as part of a tax deficiency assessment for 1941 which had been previously abated (R. 5, 7). Thus, the taxpayer has never recovered the total tax paid by it for 1941 despite the fact that the Collector recognizes that it had no tax liability whatever for 1941.

The Solicitor General takes the anomalous position that a taxpayer owes interest although admittedly he does not owe any tax. There is no authority in the Internal Revenue Code for such contention. Interest cannot be collected on a non-existent debt. It arises and becomes payable as part of the debt. If there is no debt, there can be no liability for interest.

The collection from taxpayers of interest is specifically covered by Section 292 (Appendix, p. iv) which provides that interest "upon the amount determined as a deficiency" shall be assessed at the same time as the deficiency "and shall be collected as a part of the tax". See also Section 294(b) (Appendix, p. v). Accordingly, the statute re-

stricts the collection of interest to a case where (1) there is a tax deficiency, and (2) that tax deficiency is collected.

Section 271(a) (Appendix, p. ii) defines a deficiency as "the amount by which the tax imposed" by law exceeds the amount shown as the tax by the taxpayer upon his return, with certain adjustments not here relevant. Since the Collector admits that "the tax imposed" for 1941 was zero, there was no deficiency in the taxpayer's tax which could call for the payment of interest.

Moreover, the assessed deficiency was never collected. The law requires that interest shall be "collected as a part of the tax". There could hardly be a clearer statutory expression of Congressional intent that where no tax deficiency exists and *none has been collected* interest may not be collected.

Since specific statutory provisions govern the collection of interest on tax, the Solicitor General cannot rely on analogies or common law rules making interest payable on debts in the absence of statute. *Standard Oil Co.* v. *United States,* 10 F. Supp. 550 (Ct. Cls., 1935), cert. den. 296 U. S. 597 (1935). See also *Western Union Telegraph Co.* v. *Priester,* 276 U. S. 252 (1928); *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907). In any event, the Collector necessarily fails here, under Code or common law, since admittedly there is no debt.

The Commissioner of Internal Revenue, in connection with an earlier Revenue Act, adopted the very position taken here by the taxpayer. Section 204(b) of the Revenue Act of 1918 (Appendix, p. xii) provided for a net loss carry-back. The Commissioner ruled that where a deficiency in 1918 tax had been wiped out by a 1919 loss carried back to 1918, that tax deficiency, together with interest

and penalties paid with respect to that deficiency, must be refunded to the taxpayer. L. O. 1115, II-2 C. B. 221 (1923). That ruling states that inasmuch as penalties and interest are considered as "a part of the tax" under the law for the purposes of assessment, collection and refund, the interest and penalties must be refunded as a part of the tax deficiency where it is wiped out by a carry-back. The Commissioner reached a similar conclusion in I. T. 1447, I-2 C. B. 220 (1922), which states that "interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax." In other words, the settled administrative interpretation and practice has been directly contrary to the position newly taken here by the Solicitor General.

Similarly the Courts have long held that interest is an accretion to and part of the tax in connection with any refund or credit of the tax. As stated in *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721 (C. C. A. 8th, 1931), tax and interest "constitute a single liability" and the Government does not have "two separate, independent claims; one for a tax; one for interest". *Phelps* v. *United States*, 105 F. (2d) 904 (C. C. A. 2nd, 1939), and *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769 (C. C. A. 10th, 1932), also hold that any interest paid by a taxpayer as a part of a tax deficiency assessment is refundable if it is later determined that the tax deficiency should be refunded.

There is no statute of limitations in the Code expressly applicable to the assessment, collection, and refund of interest. The doctrine that tax and interest constitute a single liability, however, has caused the Commissioner and the

Courts to apply the same statute of limitations to interest as to the tax itself. Otherwise a situation would arise as incongruous as that for which the Solicitor General here contends, and a tax liability or a tax refund might be barred by the statute of limitations, but a claim for interest would still be collectible.

Additional support for the taxpayer's position is found in the very procedure whereby the interest in this case was "collected" by the Collector. He credited the refund of tax admittedly due to the taxpayer against interest allegedly due from it. Section 322(a) (Appendix, p. vi) provides that the amount of any overpayment of tax shall be credited against any "*tax* or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer" (emphasis supplied). There is no authority in the Internal Revenue Code for the crediting of an overpayment of tax against *interest*, rather than against tax, except by reason of the well settled doctrine that "interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax." L. O. 1115 and I. T. 1447, *supra*.

The Solicitor General devotes a considerable portion of his brief (pp. 19-28) to an involved argument based on the provisions of Section 3779 (Appendix, p. viii), which was added to the Code in 1945, whereby a taxpayer expecting an operating loss in a given year (1946, for example) may postpone the payment of his tax for the preceding year (1945). To the extent that the operating loss carry-back from 1946 eventually reduces his tax for 1944, he is only required to pay 3% interest on the extension of his 1945 tax. In the first place, that section concededly has no direct application to the case at bar. The Solicitor General quite obviously does not contend that Section 3779 *authorizes* the

collection of 6% interest in the instant case on the taxpayer's inchoate liability for 1941 tax since Section 3779 is not retroactive. He argues rather that Section 3779 is evidence of Congressional intent which is consistent with his position.

There is no substance to that argument. In general, Section 3779 merely authorizes a reduced rate of interest where an extension in the payment of tax for *one* year is compensated for by a reduction of tax in *another* year. In the absence of Section 3779, which provides for a 3% rate of interest, it is evident that a taxpayer could not extend the time for payment of his 1945 tax because of an expected reduction in his 1944 tax, without paying the 6% interest rate provided in Section 295 (Appendix, p. vi).*

Section 3779 relates only to extensions of time for the payment of tax shown by a taxpayer's return to be due. Otherwise there would be no need for an extension of time for payment. That section treats a taxpayer expecting a carry-back more considerately than an ordinary taxpayer. Section 295 is the relevant section in this field applicable to the year 1941. The Solicitor General does not cite it or rely on it. It is not apparent why he relies on Section 3779, which by its terms modifies the rule of Section 295 only for 1945 and later years.

To summarize, the Solicitor General, in order to support his position here, ignores the established practice of the Commissioner and the Bureau of Internal Revenue as well as judicial holdings that interest is an accretion to, and part of, the tax, and that where a tax is refunded, interest collected as a part thereof must necessarily also be refunded.

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*If the tax with respect to which the extension was granted is refunded, the interest imposed for the extension is also refunded under the settled administrative procedure above outlined in this brief.

If interest paid by a taxpayer on a tax deficiency must be refunded when the tax is refunded, what possible justification has the Solicitor General for asserting that interest may be collected on an abated tax deficiency assessment and in the absence of any tax liability? The statute clearly restricts the collection of interest to a case where a deficiency in tax exists. Where there is no tax liability whatever there is no basis for collecting interest. As was stated by the Court of Appeals below in holding for the taxpayer, the most there was in the instant case was an inchoate tax liability which disappeared in the final accounting when the taxpayer's actual 1941 tax liability was determined to be zero.

II. IN DETERMINING A TAXPAYER'S NET INCOME A NET OPERATING LOSS DEDUCTION IS TREATED NO DIFFERENTLY THAN ANY OTHER DEDUCTION.

In order to prevail in this case, the Solicitor General must take the position that Section 23 proclaims a different treatment for a deduction allowable under subsection 23(s) than it does for a deduction allowable under its many other subsections. Section 23 is the section of the Code prescribing the deductions which "shall be allowed" "in computing net income" for any year. Section 23(s) (Appendix, p. i) provides that in computing net income "there shall be allowed" for "any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122". Section 122(b)(1) (Appendix, p. i) in turn provides that "a net operating loss shall be a net operating loss carry-back". The mandatory word "shall" is used in both sections, which is the same language employed with respect to other deductions allowable in computing net income under Section 23, such as business expenses and interest. Of course, as the Solicitor General

says (Br., p. 29), deductions are a matter of legislative grace. It follows that once Congress, as a matter of legislative grace, has provided that a deduction "shall be allowed" for a particular year (here 1941), no discretion is left to this Court or to any administrative official with respect to such allowance.

The Commissioner of Internal Revenue has consistently ruled that the carry-back provisions of the internal revenue laws, whereby an operating loss in a later year becomes an operating loss deduction in an earlier year, operate *nunc pro tunc*. Such a deduction is to be treated as is any other deduction allowable for that earlier year.

He first took that position in respect of the net loss carry-back provided by Section 204(b) of the Revenue Act of 1918 (Appendix, p. xii), and ruled that where a deficiency in tax plus interest and fraud penalties for the year 1918 was wiped out by the carry-back to 1918 of a net loss suffered in 1919, not only should the deficiency be refunded to the taxpayer but also the interest and fraud penalty paid in connection therewith. L. O. 1115, II-2 C. B. 221 (1923), *supra*. Section 252 of the Revenue Act of 1918 (Appendix, p. xiii), which was the refund provision there involved, is in all material respects the same as the refund provision contained in Section 322(a). In other words, the only published ruling of the Commissioner in point is squarely contrary to the position taken by the Solicitor General in this proceeding and yet he has made no effort to explain why he has taken a position contrary to administrative practice.*

*This Court has frequently held that when the Congress enacts a Revenue Act, it is deemed to have adopted the interpretation which the Commissioner has placed upon the comparable provisions of earlier Revenue Acts and the administrative practice followed thereunder. *Crane* v. *Commissioner*, 331 U. S. 1 (1947), and cases therein cited.

Moreover, the Commissioner in his own Regulations under the carry-back provisions of the Code has reiterated the settled position that a carry-back operates *nunc pro tunc*. He requires the earlier year's net income to be recomputed under the carry-back so as to disallow certain deductions which are limited to a specified percentage of "net income". In T. D. 5498, 1946-1 C. B. 209, the following statement is made at Section 474.11:

> "Thus, any deduction limited, for example, by net income or adjusted gross income, such as the deduction for charitable contributions, is to be recomputed on the basis of the net income or adjusted gross income as affected by the carry-back."*

Again in a situation converse to that presented in the instant case, the Commissioner ruled that the carry-back applied *nunc pro tunc*, and Congress in amending the statute recognized that it so applied. That situation arose in connection with the unused excess profits credit carry-back provided by Section 710(c)(3)(A) (Appendix, p. vi). There, for example, if a taxpayer corporation had an unused excess profits credit for 1944 which was carried back to the year 1942, the effect was to reduce the excess profits tax payable but at the same time to increase the income tax payable. Under those circumstances, the Commissioner ruled that interest upon the deficiency *caused* by the carry-

*For example, if a corporate taxpayer had net income shown on its return for 1941 of $100,000 and had deducted $5,000 for charitable contributions in that year under the 5% limitation provision of Section 23(q) and then had a net operating loss of $90,000 in 1943 which, by reason of the carry-back, became an additional deduction in 1941, the Commissioner would compel it to reduce its deductions for charitable contributions to 5% of the net income figure of $10,000 after applying the carry-back, namely, $500.

back ran from the payment date for the tax of the earlier year. In recognizing that interest on a tax deficiency arising out of a carry-back ran from the payment date for the tax of the earlier year, the Commissioner took a position directly contrary to that now being urged by the Solicitor General in the instant case, since interest could run from that date only if the carry-back was effective as of that date. The Congress recognized that such was the proper construction of the statute, saying in the Report of the Ways and Means Committee on the Tax Adjustment Act of 1945 (Report No. 849, 79th Cong., 1st Sess., p. 33):

> "Interest on such deficiency, under the present law, is payable from the date prescribed for payment of the tax or, if the tax is paid in installments, the date prescribed for payment of the first installment."

In order to correct that situation, the Congress, by Section 6(a) of the Tax Adjustment Act of 1945, 59 Stat. 517, added Section 292(c) to the Code (Appendix, p. v) which specifically provided that if a deficiency in tax is caused by a carry-back, then no interest shall be payable upon the deficiency except for such period as the Commissioner of Internal Revenue shall be required to pay interest on an overpayment caused by a carry-back pursuant to Section 3771(e) (Appendix, p. vii), *i.e.*, from the date of filing of the claim for refund of the overpayment.

Further indication that deductions which arise in later years are to be treated in all respects in the same manner as are deductions fully determinable in the prior year is to be found in the practice of the Commissioner with respect to retroactive amendments to the Internal Revenue Code. In recent years the Congress has enacted many retroactive amendments permitting deductions to be taken which would

not have been proper deductions in the year to which they were, by reason of the retroactive amendment, applied. For example, Section 23(a)(2), providing for the deduction of non-business expenses, was added by Section 121 of the Revenue Act of 1942, which amendment was applicable to all prior years. Until that amendment was enacted, such deductions were not allowable. *Higgins* v. *Commissioner*, 312 U. S. 212 (1941). The Courts have nevertheless held, and the Commissioner of Internal Revenue has apparently agreed, that such a retroactive deduction is to be treated as if it had been permitted under the law in force in the earlier year and, therefore, deficiencies which had been paid with interest under the law in force in earlier years are refundable, *together with interest*. *Spear* v. *Gagne*, 49 F. Supp. 263 (D. N. H., 1943). See also *Kimbrell* v. *Dallman*, 80 F. Supp. 695 (S. D. Ill., 1948); *Higgins* v. *United States*, 75 F. Supp. 252 (Ct. Cls., 1948).

The same result has been reached in cases involving the retroactive application of the tax benefit rule to all prior years by Section 22(b)(12), added by Section 116 of the Revenue Act of 1942. Prior to the enactment of the 1942 Act, the tax benefit rule was not applicable. *Commissioner* v. *United States & International Securities Corp.*, 130 F. (2d) 894 (C. C. A. 3rd, 1942); *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. (2d) 44 (C. C. A. 4th, 1942). However, any deficiencies *plus interest* paid for prior years which were wiped out by the application of that retroactive provision are refundable, together with interest. *Zion's Savings Bank & Trust Co.* v. *Korth*, 56 F. Supp. 519 (D. Utah, 1944), affirmed 148 F. (2d) 170 (C. C. A. 10th, 1945). See also *Fairbanks, Morse & Co.* v. *Harrison*, 63 F. Supp. 495 (N. D. Ill., 1945).

To summarize, the Internal Revenue Code, at Section 23(s), specifically provides that a net operating loss deduction is to be treated as is any other deduction in determining a taxpayer's net income. The Commissioner has ruled in an identical case that the deduction is not distinguishable from the other deductions provided by Section 23, and the Congress has stated that a carry-back adjustment is to be fully taken into effect in determining the tax liability of the year in which the deduction is taken. Many situations have arisen under the Code where the existence or the amount of a deduction is not known for several years subsequent to the filing of a return or the payment of a tax but, nevertheless, the deduction is treated as if it had been allowable in the prior year under the law then in effect. The general rule that interest collected as a part of a tax deficiency must be refunded when the deficiency itself is refunded is not changed in any way because the deduction is not known at the time the return is filed and arises because of subsequent events. The settled judicial and administrative procedure in like cases is thus squarely contrary to the Solicitor General's contentions here. That long-established practice should not be upset, particularly when no cogent reasons are urged for the reversal of the established rule.

III. SECTION 3771(e) OF THE CODE IS IRRELEVANT TO THE INSTANT CASE.

The Collector is claiming that the taxpayer *owes* him interest upon a tax which *would have* been payable *but for* the deduction provided by Section 23(s). The Solicitor General attempts to support that claim by citing an irrelevant section of the Code, Section 3771(e) (Appendix, p. vii), which provides that the Commissioner of Internal Revenue

does not have to *pay* interest from Government funds on a refund of tax attributable to a carry-back of loss for any period before the filing of a claim for refund thereof. The purpose of that section, as stated in the Congressional Committee Reports quoted by the Solicitor General in his brief, was to speed up the filing of refund claims by taxpayers so that the Government might be apprised of the amount of the claims against it. Indeed, the section is a tacit admission that, except for its provisions, the Commissioner would have to *pay* interest *to a taxpayer* from Government funds for a period beginning with the payment of the tax for the earlier year. There is no correlative provision in Section 292, which deals with interest to be paid *by* taxpayers *to the Government* on deficiencies in tax. Examples of the non-correlation of the deficiency and refund provisions of the Code are numerous. A few of them are outlined in the footnote.*

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*(1) The interest upon a deficiency in tax runs from the due date for the payment of the *first* installment of tax (Section 292(a)), whereas the interest payable upon a refund of tax under Section 3771(a) runs only from the date of payment of the last installment of the tax. *Blair* v. *Birkenstock*, 271 U. S. 348 (1926). There thus may be a gap of nine months or more between the dates upon which interest on a *deficiency* and interest on a *refund* would begin to run.

(2) Prior to 1945, interest upon a deficiency caused by a carry-back ran from the original due date of the tax for the earlier year, whereas under Section 3771(e) interest upon a refund attributable to a carry-back did not run until the filing of a claim for refund therefor. The Congress corrected this situation by statute when it enacted Section 292(c), *supra*, p. 15, in 1945.

(3) The statute of limitations with respect to assessments of *deficiencies* in tax, contained in Section 275, has always been separate and distinct from the statute of limitations with respect to claims for *refund* of overpayments of tax which is contained in Section 322. An extension of the statute of limitations for

Why it should follow from the fact that the Commissioner *does not* have to *pay* interest *to* the taxpayer, that the Commissioner should be able to *collect* interest *from* the taxpayer, is not apparent either from the Solicitor General's brief or otherwise. The argument that because I do not owe you interest, I have a right to collect interest from you is an obvious *non-sequitur*. Moreover, a refund of a tax without interest (Section 3771(e)) is hardly as great a phenomenon as the payment of interest upon a non-existent tax liability.*

To summarize, the deficiency provisions of the internal revenue laws have always been separate and distinct from the refund provisions. Interest on a deficiency and interest on a refund normally run for different periods. Any correlation between the two sets of Code provisions has been made by Congressional amendments to the law and not by the Courts.

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assessment did not extend the statute of limitations for refund until an express statutory provision to that effect was put into the Code in 1942. Section 322(b)(3), added to the Code by Section 169(a) of the Revenue Act of 1942.

(4) Section 311(b) provides that the statute of limitations for *assessment* of tax against a transferee of a taxpayer shall expire one year after the expiration of the statute of limitations for assessment against the taxpayer. There is, however, no correlative provision in Section 322 relating to the statute of limitations for *refund*, and the Congressional Committees have been considering a provision to correlate the deficiency and the refund provisions in that regard. See Section 148 of H. R. 6712, the Revenue Revision Bill of 1948, as passed by the House of Representatives on June 19, 1948.

*" 'All right', said the Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

" 'Well! I've often seen a cat without a grin', thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!' " Lewis Carroll, *Alice in Wonderland*, Chapter VI.

IV. A CARRY-BACK DEDUCTION IS AN INTEGRAL PART OF THE DETERMINATION OF TAX LIABILITY.

The Solicitor General does not, and indeed he cannot, argue that the final tax liability for any year is to be determined without reference to the net operating loss deduction. Section 23(s) specifically provides that such a deduction shall be allowed and, therefore, must be taken into account in determining the year's tax liability. The Courts have held that a carry-back from a subsequent year is to be considered in the determination of the proper tax liability of the prior year or years. *Gorman Lumber Sales Co.*, 12 T. C. 1184 (1949); *Acampo Winery & Distilleries, Inc.*, 7 T. C. 629 (1946), acquiesced in by the Commissioner, 1949 I. R. B. No. 11, p. 1; *Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. (2d) 549 (C. A. 5th, 1949), affirming on this issue 9 T. C. 990 (1947). Furthermore, Section 272(g) provides that the Tax Court "shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of" the tax liability of the year before it.

Thus, the taxpayer's final 1941 tax liability could not be determined until recognition had been given to the net operating loss deduction which arose out of 1943. The potential deficiency or inchoate liability for 1941 tax wiped out by the carry-back deduction was rendered non-existent and any liability for interest assessed as part of such tax was also completely extinguished.

V. A REVERSAL OF THE DECISION OF THE COURT OF APPEALS WOULD RESULT IN INEQUITIES AS BETWEEN TAXPAYERS.

In the normal situation the Commissioner of Internal Revenue is forbidden by law to assess a deficiency in tax

until he has given the taxpayer an opportunity to have his tax completely redetermined and the carry-back of loss taken into account in such determination by The Tax Court of the United States. Section 272(a) (Appendix, p. ii). The Tax Court will, in the proceeding before it, determine the operating loss deduction under Section 23(s) which is caused by a carry-back from a subsequent year, and its decision will be that (1) there is no deficiency for the year, or (2) there is a deficiency for the year *after* application of the carry-back, or (3) there is an overpayment for the year. *Gorman Lumber Sales Co.*, 12 T. C. 1184 (1949), *supra; Acampo Winery & Distilleries, Inc.*, 7 T. C. 629 (1946), *supra; Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. (2d) 549 (C. A. 5th, 1949), *supra.*

Thus in the usual case the Commissioner can never *assess* a deficiency plus interest of the character upon which he bases his claim here. Thus, there is normally no assessment to be wiped out by the carry-back. The Solicitor General makes no argument in his brief that the Collector could collect interest in the absence of an assessment. There is clearly no provision authorizing any such collection procedure. On the contrary, the Solicitor General urges this Court to sustain him in his position on the ground that the Commissioner *did* make an *assessment* of a deficiency in this case.

The Solicitor General's position in this case discriminates against taxpayers against whom, for some reason such as bankruptcy as in the instant case (where the taxpayer presumably is in dire need of funds), the Commissioner is permitted to make an immediate assessment of a tax deficiency under Section 274(a) (Appendix, p. iii)

without allowing any prior judicial determination of liability. His position also means different treatment for taxpayers depending upon whether their returns are promptly audited or whether there is a delay in audit until the amount of the carry-back loss has been determined so that no deficiency would ever be assessed.

The Solicitor General also states that a decision in favor of the taxpayer will create great difficulties for the Government because "irresponsible and unscrupulous" taxpayers will file patently incorrect returns in the hope that penalties and interest will be wiped out by a carry-back of a loss occurring *two years later* (Br., p. 28). We have already shown that on the contrary the adoption of the Solicitor General's contentions will cause the Commissioner much greater difficulties in upsetting established and long continued administrative practice, approved by the Courts. Moreover, the provisions of the Code prescribing penalties for filing a negligent return (5% of tax under Section 293(a)) or a fraudulent return (50% of tax under Section 293(b)) plus the criminal penalties for filing a fraudulent return (fine and imprisonment under Section 145) have proved to be ample safeguards against "irresponsible and unscrupulous" taxpayers. Finally there is no suggestion that this taxpayer was irresponsible or unscrupulous.

Summary

The Solicitor General's argument in this case to the effect that tax and interest do not constitute a single liability, and that interest may be due when the tax is not, is contrary to the long-established administrative practice as embodied in the published rulings of the Commissioner and in Court decisions over the past thirty years or more. A

decision in favor of the Collector in this case would be contrary to the express terms of the Internal Revenue Code, would create confusion in other situations, and would result in inequities as between taxpayers.*

CONCLUSION

THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT SHOULD BE AFFIRMED.

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November 10, 1949.

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*The instant case involves a taxpayer in bankruptcy, one of the few types of taxpayers against which an assessment of a tax deficiency can be made, without the taxpayer's written consent, before a determination of the carry-back has occurred. To add further to the uniqueness of the instant case, the assessment, although made, was never collected. It would be interesting to know what percentage of the approximately 58,600 cases referred to in the petition for certiorari (pp. 6-7) and the Solicitor General's brief (p. 11n) actually do involve the fact situation presented in this case. We believe it is fair to say that the instant fact situation would be unlikely to arise in more than a very small percentage of those cases.

APPENDIX

Internal Revenue Code, 53 Stat. Part I, 26 U. S. C.:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

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(s) *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * * * * *

Sec. 122. NET OPERATING LOSS DEDUCTION.

(a) [As amended by Sec. 105(e)(3)(A) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Amount of Carry-Back and Carry-Over.*—

(1) *Net Operating Loss Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net

operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * * * * *

(e) [As amended by Sec. 153(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *No Carry-Back to Year Prior to 1941.*—As used in this section, the term "preceding taxable year" and the term "preceding taxable years" do not include any taxable year beginning prior to January 1, 1941.

* * * * * * * *

Sec. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax;

* * * * * * * *

Sec. 272 [As amended by Sec. 168(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*—*If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed

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*The Revenue Act of 1942 changed the name of the Board of Tax Appeals to The Tax Court of the United States.

(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

* * * * * * * *

Sec. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate Assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner

in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272(a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

* * * * * * * *

Sec. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the

thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

* * * * * * * *

(c) [As added by Sec. 6(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] *Deficiency Resulting From Carry-Back and Related Matters.*—If any part of a deficiency is determined by the Commissioner to be attributable (A) to a carry-back to which an overpayment described in section 3771(e), or a decrease determined under section 3780(b), in any other tax is attributable, or (B) to an error in the amount or effect of a carry-back which resulted in a credit or refund of an overpayment with interest computed pursuant to section 3771(e), or in a decrease determined under section 3780(b), no interest shall be assessed or paid under subsection (a) with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment or for a period prior to the application of such decrease.

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Sec. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

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(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on

or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

* * * * * * * *

SEC. 295. TIME EXTENDED FOR PAYMENT OF TAX SHOWN ON RETURN.

If the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, is extended under the authority of section 56 (c), there shall be collected as a part of such amount, interest thereon at the rate of 6 per centum per annum from the date when such payment should have been made if no extension had been granted, until the expiration of the period of the extension.

* * * * * * * *

SEC. 322. [As amended by Sec. 172(e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * * * * *

SEC. 710. IMPOSITION OF TAX.

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(c) [As added by Sec. 2(b) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and amended by Sec. 204 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Unused Excess Profits Credit Adjustment.*

* * * * * * * *

(3) *Amount of Unused Excess Profits Credit Carry-Back and Carry-Over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b)(1).

* * * * * * * *

Sec. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

* * * * * * * *

(e) [As added by Section 153(d) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part

of the overpayment or the filing of a petition with the Board, whichever is earlier.

* * * * * * * *

Sec. 3779. [As added by Sec. 4(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] EXTENSIONS OF TIME FOR PAYMENT OF TAXES BY CORPORATIONS EXPECTING CARRY-BACKS.

(a) *In General.*—If a corporation, in any taxable year ending on or after September 30, 1945, files with the collector a statement, as provided in subsection (b), with respect to an expected net operating loss carry-back or unused excess profits credit carry-back from such taxable year, the time for payment of all or part of any tax imposed by chapter 1 or 2 for the taxable year immediately preceding such taxable year shall be extended, to the extent and subject to the conditions and limitations hereinafter provided in this section.

(b) *Contents of Statement.*—The statement with respect to an expected carry-back referred to in subsection (a) of this section shall be sworn to in the manner prescribed by section 52 in the case of a return and shall be filed at such time and in such manner and form as the Commissioner, with the approval of the Secretary, may by regulations prescribe. Such statement shall set forth that the corporation expects to have a net operating loss carry-back, as provided in section 122(b), or an unused excess profits credit carry-back, as provided in section 710(c)(3), from the taxable year in which such statement is made, and shall set forth, in such detail and with such supporting data and explanation as such regulations shall require—

(1) the estimated amount of the expected net operating loss or unused excess profits credit;

(2) the reasons, facts, and circumstances which cause the corporation to expect such net operating loss or unused excess profits credit;

(3) the amount of the reduction, attributable to the expected carry-back, in the aggregate of the taxes previously determined for all taxable years affected by the carry-back prior to the taxable year of the expected loss or unused credit; such taxes previously determined being ascertained in accordance with the method prescribed in section 3801 (d); and such reduction being determined by applying the expected carry-back in the manner provided by law to the items on the basis of which such taxes were determined but such reduction being decreased by the amount of any credits under section 780 properly allocable to such reduction;

(4) the tax or taxes and the amount thereof the time for payment of which is to be extended; and

(5) such other information for the purpose of carrying out the provisions of this section as may be required by such regulations.

The collector shall, upon request, furnish a receipt for any statement filed, which shall set forth the date of such filing.

(c) *Amount to Which Extension Relates and Installment Payments.*—The amount the time for payment of which may be extended under subsection (a) with respect to any tax shall not exceed the amount of such tax shown on the return, increased by any amount assessed as a deficiency (or as interest or additions to the tax) prior to the date of filing the statement and decreased by any amount paid or required to be paid prior to the date of such filing, and the total amount of the taxes the time for payment of which may be extended shall not exceed the amount stated under clause (3) of subsection (b). For the purposes of this subsection, an amount shall not be considered as re-

quired to be paid unless shown on the return or assessed as a deficiency (or as interest or addition to the tax), and an amount assessed as a deficiency (or as interest or additions to the tax) shall be considered to be required to be paid prior to the date of filing of the statement if the tenth day after notice and demand for its payment occurs prior to such date. If an extension of time under this section relates to only a part of a tax, the time for payment of the remainder shall be considered to be the dates on which payments would have been required if such remainder had been the tax and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b).

(d) *Period of Extension.*—The extension of time for payment provided in this section shall expire—

(1) on the last day of the month in which falls the last date prescribed by law (including any extension of time granted the taxpayer) for the filing of the return for the taxable year of the expected net operating loss or unusued excess profits credit, or

(2) if an application for tentative carry-back adjustment provided in section 3780 with respect to such loss or unused credit is filed before the expiration of the period prescribed in clause (1) on the date on which notice is mailed by registered mail by the Commissioner to the taxpayer that such application is allowed or disallowed in whole or in part.

(e) *Revised Statements.* — Each statement filed under subsection (a) with respect to any taxable year shall be in lieu of the last statement previously filed with respect to such year. If the amount the time for payment of which is extended under a statement filed is less than the amount under the last statement previously filed the extension of time shall be terminated as to the difference between the two amounts.

(f) *Termination by Commissioner.*—The Commissioner is not required to make any examination of the statement, but he may make such examination thereof as he deems necessary and practicable. The Commissioner shall terminate the extension as to any part of the amount to which it relates which he deems should be terminated because, upon such examination, he believes that, as of the time such examination is made, all or any part of the statement clearly is in a material respect erroneous or unreasonable.

(g) *Payments on Termination.*—If an extension of time is terminated under subsection (e) or (f) with respect to any amount, then—

(1) no further extension of time shall be made under this section with respect to such amount, and

(2) the time for payment of such amount shall be considered to be the dates on which payments would have been required if there had been no extension with respect to such amount and the taxpayer had elected to pay the tax in four equal installments as provided in section 56(b).

(h) *Jeopardy.*—If the Commissioner believes that collection of the amount to which an extension under this section relates is in jeopardy, he shall immediately terminate such extension and notice and demand shall be made by the collector for payment of such amount.

(i) *Interest.*—In the case of an amount the time for payment of which has been extended, there shall be collected as part of such amount interest from the dates on which payments would have been required if there had been no extension and the taxpayer had elected to pay the tax in four equal installments as provided in section 56(b)—

(1) upon so much of such amount as is satisfied under Section 3780(b) by applying or crediting

thereto, within the period of extension, a decrease in tax determined in connection with an application under section 3780(a), interest at the rate of 3 per centum per annum to the date of such satisfaction, except that on so much of such satisfied amount as is not in excess of the amount of the deficiencies assessed under section 3780(b) and which is not so satisfied, the rate shall be 6 per centum per annum; and

(2) upon the remainder of the amount the time for payment of which has been extended, interest at the rate of 6 per centum per annum to the date such amount is paid.

If the Commissioner determines that during the period of extension credit or refund of an overpayment has been allowed or made, or a deficiency assessed, affecting the amount to which the extension relates and that the taxpayer could not have taken such overpayment or deficiency into account in the statement or a revised statement, appropriate adjustment shall be made in the interest.

Revenue Act of 1918, 40 Stat. 1057, c. 18:

Sec. 204.

* * * * * * * *

(b) If for any taxable year beginning after October 31, 1918, and ending prior to January 1, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount of such net loss shall under regulations prescribed by the Commissioner with the approval of the Secretary be deducted from the net income of the taxpayer for the preceding taxable year; and the taxes imposed by this title and by Title III for such preceding taxable year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis

of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. If such net loss is in excess of the net income for such preceding taxable year, the amount of such excess shall under regulations prescribed by the Commissioner with the approval of the Secretary be allowed as a deduction in computing the net income for the succeeding taxable year.

* * * * * * * *

Sec. 252.

That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

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No. 70

In the

Supreme Court of the United States

October Term 1949

JOHN E. MANNING, as Collector of Internal Revenue for the Fifth District of New Jersey,

vs.

SEELEY TUBE AND BOX COMPANY, a Corporation of the State of New Jersey.

BRIEF ON BEHALF OF

GORDEN F. DeFOSSET
1104-10 B. F. Keith Bldg.,
Cincinnati 2, Ohio.

AMICUS CURIAE.

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OPINION BELOW

The opinion of the District Court is reported in 76 Federal Supp. 937. The opinion of the Court of Appeals is reported in 172 Federal 2nd. 77.

QUESTION PRESENTED

The question before the court is whether a taxpayer who suffers a net operating loss in 1943 and pursuant to the Internal Revenue Code carries said loss back to 1941 and is thereby entitled to a refund, shall have that refund reduced by the Commissioner in the amount of interest computed on additional taxes found to be due for 1941. Or put more directly: If the Government owes the taxpayer a refund and the taxpayer owes the Government a tax liability less than the amount of the refund, both for the same year, is the Government entitled to assess interest on the liability the taxpayer owes the Government.

STATEMENT

The answer to the problem above stated may only be found in the Internal Revenue Code. All matters involving the relationship between the taxpayer and his government must be solved by an interpretation of the statutes and the decided cases, for income taxation is wholly statuatory.

With the exception of the lower court opinions in this case and the case of *Brandtjen and Kluge, Inc.* v. *United States*, 78 Federal Supp. 509 (D. Minn.) there is no case law dealing directly with this problem. Therefore the only solution must be found in the pertinent statutes and their logical interpretation.

I

If the Commissioner is to charge the taxpayer interest he must do so as the result of Sec. 292 (a) of the Internal Revenue Code (26 U. S. C. 292).

Sec. 292. INTEREST ON DEFICIENCIES.

(a) (As amended by Sec. 2 (a) of the Act of December 17, 1943, c 346, 57 Stat. 601). General Rule.—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed * * * *.

The real meaning of this section cannot be ascertained until we know what a deficiency is. This is defined by Section 271 (26 U. S. C. 271).

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously

assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

Stripped of its verbage it defines a deficiency as the difference between the tax shown on the original return plus any additional tax assessed, less any amount abated, credited, refunded or otherwise repayed because the amount due was less than that which was found to be due.

Therefore when by reason of a carry back the taxpayer is entitled to a refund for 1941 in excess of the amount of tax shown on the return plus any amount previously assessed for the year in question (1941) there can be by the very definition of a deficiency no deficiency and consequently no interest.

The Commissioner realizes that no deficiency exists in a case such as is before this court for he refers to the foundation on which he would charge interest as a "potential deficiency." One may search the Code minutely and never find a definition of such a term. There is no possible way to have a "potential deficiency" under the Internal Revenue Code.

II.

If there is no deficiency but instead an overpayment then following the code it appears at Sec. 322(a) (26 U. S. C. 322) the method by which an overpayment is to be handled.

SEC. 322. REFUNDS AND CREDITS.

(a) Authorization.—

(1) Overpayment.—Where there has been an overpayment of any tax imposed by this chap-

> ter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits *tax* or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

It is important to note that this section specifically holds that any overpayment *shall* be credited against any *tax* due and the balance refunded immediately to the taxpayer.

This Court has held in (*U. S.* v. *Childs* 266 U. S. 304, 45 S. Ct. 110) that interest while it is collected as part of the tax is not a tax.

Therefore when the Commissioner finds that there is an overpayment such as he did in this instance may he in direct contravention of the mandatory language of Sec. 322 credit a part of that overpayment to interest.

The case of *Brandtjen & Kluge, Inc.*, v. *U. S. Supra*, interprets Sec. 322 in exactly this manner. In that case the taxpayer paid its deficiency plus interest only to find out later by reason of a carry back it was entitled to the original tax plus the deficiency on a refund. The Commissioner issued the refund but refused to return the interest previously collected. The Court in holding for the Government said that since interest is not a tax and Sec. 322 says "where there has been an overpayment of any *tax* etc." then the Commissioner may not refund the interest because this section only requires him to refund the tax. If the first sentence of Sec. 322 is to be interpreted strictly then certainly the balance of the section should receive the same interpretation.

The Commissioner might conceivably argue that Sec. 3771 (e) 26 U. S. C. 3771 requires him to charge interest on what the Bureau calls a "potential deficiency." This

conclusion certainly does not follow if one examines that section closely. All that Sec. 3771 means is that the taxpayer is not entitled to interest on any refund due to a carry back prior to filing his claim for a refund. In the instant case the taxpayer is not asking for interest on the amount due on the refund but instead is asking that the Commissioner not charge interest on an inchoate liability.

III.

If this problem is to be finally determined by this Court for the efficient administration of the Bureau of Internal Revenue and certainly for the taxpayers, it might be valuable to assume a set of facts somewhat different than the case at Bar.

Assuming that the taxpayer does not agree to a waiver of the restrictions on assessment as he has the right to do under Sec. 272(d). Then pursuant to paragraph (a) and (b) of said section the Commissioner may not assess a deficiency until either 90 days has elapsed after sending taxpayer his proposed assessment or until, if the taxpayer has filed a petition with the Tax Court, that Court's decision becomes final.

Therefore if the taxpayer after receiving the 90 day notice files a Petition with the tax court for the year out of which the proposed deficiency arises he may set up in that proceeding the carry back from a subsequent year. Sec. 272 (g), *Birch Ranch & Oil Co.* 48039 Prentice Hall Memo. T. C., 17 T. C. Memo. Dec. 132. If this carry back is large enough to eliminate the proposed deficiency (as in the case at bar) then the Tax Court must find that no deficiency exists and will find that an overpayment exists.

Should the Commissioner attempt to assess this proposed deficiency prior to the time stated in Sec. 272(a) he may be enjoined by a proper proceeding as stated in Sec. 272(a) (1).

It follows logically that if the Tax Court determines that no deficiency exists there may then be no interest collected.

While the above situation admittedly presents a different set of facts than is here in the case at bar it can easily be seen that a decision in favor of the Commissioner in the instant case would force taxpayers to resort to the procedure outlined in the assumed case above with the consequent crowding of the Tax Court's dockets, a tribunal that is even now overburdened with litigation. The procedure before the Tax Court would of necessity be only a formality since in almost all of this type of cases the taxpayer and the Commissioner are in agreement as to the amount of the carry back as well as the amount of the additional tax proposed. Requiring taxpayer as well as the Commissioner, to resort to this added expense and time would certainly be a result not in the best interest of either party or the intention of Congress.

CONCLUSION

The Commissioner is in error when he charges the taxpayer's refund with interest computed on a potential deficiency for the following reasons:

1: There is no deficiency and therefore there can be no interest. Subdivision I supra.

2: His procedure in making such charge is in contravention of the mandatory language of the code concerning the handling of overpayments. Subdivision II Supra.

3: To conclude this problem in favor of the Commissioner would force taxpayers as well as the Commissioner into the Tax Court for a mere formality (Subdivision III Supra).

The answer to the problem presented here to the Court can best be stated in the homey, common sense language of the Court below "Interest on nothing (what the taxpayer owed the government) is necessarily nothing."

Respectfully submitted.

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APPENDIX

Internal Revenue Code.

Sec. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amount previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded or otherwise repaid in respect of such tax. (26 U. S. C. 271.)

Sec. 272. PROCEDURE IN GENERAL.

(a) (1) Petition to Board of Tax Appeals. If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in Court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

(b) Collection of Deficiency Found by Board.—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as

a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) Failure to File Petition.—If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) Waiver of Restrictions.—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(g) Jurisdiction Over Other Taxable Years.—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid. (26 U. S. C. 272.)

Sec. 292. INTEREST ON DEFICIENCIES.

(a) (As amended by Sec. 2(a) of the Act of December 17, 1943, c 346, 57 Stat. 601.

General Rule.—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector,

and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed * * * *. (26 U. S. C. 292.)

Sec. 322. REFUNDS and CREDITS.

(a) Authorization.—

(1) Overpayment.—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer. (26 U. S. C. 322.)

Sec. 3771. INTEREST ON OVERPAYMENTS.

(a) Rate.—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) Period.—Such interest shall be allowed and paid as follows:

(c) (As added by Sec. 153(d) of the Revenue Act of 1942, supra). Claims Based on Carry-Back of Loss or Credit.—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the

unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the over payment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier. (Sec. U. S. C. 3771.)